88-63

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DEPARTMENT OF PUBLIC SAFETY,
COMMONWEALTH OF THE NORTHERN
MARIANA ISLANDS,

Petitioner,

v.

LAWRENCE M. FLEMING,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR WRIT OF CERTIORARI

ALEXANDRO C. CASTRO
Counsel of Record
Attorney General
DAVID A. WEBBER
ERIC S. SMITH
RICHARD WEIL
STEPHEN A. COHEN
Assistant Attorneys General
Commonwealth of the
Northern Mariana Islands
Capitol Hill
Salpan, MP 96950
(670) 322-4311/4312

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED FOR REVIEW

QUESTION 1. Does the jurisdiction of the United States District Court for the Northern Mariana Islands extend to suits by citizens against the Commonwealth of the Northern Mariana Islands?

QUESTION 2. Where case law, constitutional and statutory provisions bar suits in federal court based on 42 USC 1983 against the several states and against Guam, is the Commonwealth of the Northern Mariana Islands similarly immunized from such suits under the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
REPORTS OF OPINIONS BELOW	1
GROUNDS FOR JURISDICTION	1
CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES	1
STATEMENT OF THE CASE	5
ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI	6
A. Jurisdiction of the federal courts does not extend to actions by a citizen against the Commonwealth of the Northern Mariana Islands	6
1. Historical relationship of the CNMI and the United States	6
2. Negotiation of the Covenant	9
3. Nature of the present relationship between the Commonwealth of the Northern Mariana Islands and the United States	10
B. 42 USC 1983 does not apply to the Commonwealth of the Northern Mariana Islands	18
1. The Covenant establishes a test for applicability of federal laws to the Commonwealth, and 42 USC § 1983 does not pass that test.	18
2. Even if the law were otherwise applicable, the CNMI is not a "person" under 42 USC § 1983.	19

C. Conclusion: The Court should grant certiorari to review this case 21

APPENDIX

Order denying petition for rehearing (4/11/88) 1a

Fleming v. Department of Public Safety, Commonwealth of the Northern Mariana Islands, 837 F.2d 401 (9th Cir. No. 85-2694, 4/8/88) 2a

Amendment to Decision, District Court for the Northern Mariana Islands, No. 84-0006, 9/18/85 ..... 18a

Decision, District Court for the Northern Mariana Islands, No. 84-0006, 9/11/85 ..... 20a

Decision, District Court for the Northern Mariana Islands, No. 84-0006, 6/17/85 ..... 54a

TABLE OF AUTHORITIES

CASES: Page

Commonwealth of the Northern Mariana Islands v. Atalig, 723 F.2d 682 (9th Cir. 1984) *cert. den.* 467 U.S. 1244, 82 L.Ed.2d 826, 104 S.Ct. 3518 6

Della Grotta v. State of Rhode Island, 781 F.2d 343 (1st Cir. 1986) 19,20

Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974) 14,15,16,17,18

Gale v. Andrus, 643 F.2d 826 (D.C. Cir. 1980) 6,8

Litton Industries, Inc. v. Colon, 587 F.2d 70 (1st Cir. 1978) 16

Monaco v. Mississippi, 292 U.S. 313, 54 S.Ct. 745, 78 L.Ed. 1282 (1934) 14,15

Ngiraingas v. Sanchez, ___F.2d ___(9th Cir. No. 86-2840, June 7, 1988) 10,11,18,20

Pennhurst State School v. Halderman, 465 U.S. 89, 79 L.Ed.2d 67, 104 S.Ct. 900 (1984) 16

People of Saipan v. United States Dept. of Interior, 502 F.2d 90 (9th Cir., 1974), *cert. den.* 420 U.S. 1003, 95 S.Ct. 1445, 43 L.Ed.2d 761 (1975) 8

Quern v. Jordan, 440 U.S. 332, 59 L.Ed.2d 358, 99 S.Ct. 1139 (1979) 18

Toledo, Peoria & Western R. Co. v. State of Illinois, 744 F.2d 1296 (7th Cir. 1984), *cert. den.* 470 U.S. 1051, 84 L.Ed.2d 815, 105 S.Ct. 1751 (1985) 19

United States v. Covington, 783 F.2d 1052 (9th Cir. 1985), *cert. den.* ___ U.S. ___ , 93 L.Ed.2d. 64, 107 S.Ct. 117 (1986) 6

Welch v. Texas Dept. of Highways and Public Transp., ___U.S. ___ , 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987) 14,16

Williams v. Shipping Corp. of India, 653 F.2d 875 (4th Cir. 1981), *cert. den.* 455 U.S. 982, 71 L.Ed.2d 691, 102 S.Ct. 1490 (1982) 15,16

Table of Authorities Continued

Page

CONSTITUTIONAL, STATUTORY AND TREATY AUTHORITIES

Constitution of the United States

Article III 11,12
Tenth Amendment 14
Eleventh Amendment 11,12,14,16,17,18

Constitution of the Commonwealth of the Northern Mariana Islands

Article VI 20
Article XI 20

Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America (Covenant)

Preamble 10
Section 101 13
Section 102 18,19
Section 103 17
Section 105 19
Section 402(a) 12,17,20
Section 501(a) 11
Section 502(a)(2) 18,19
Section 1002 10
Section 1003 9

United Nations Charter, Article 73 7,8,10
48 USC section 1421a 16
48 USC section 1541(b) 16
42 USC section 1933 18,19,20,21

OTHER AUTHORITIES

Hackworth, Digest of International Law, Vol. 1 (U.S. Government Printing Office, 1940) 6
League of Nations, Official Journal, January-February 1921 6

Table of Authorities Continued

	Page
U.S. Code Congressional and Administrative News, 1976	6,9
Proclamation No. 4534, October 24, 1977	10
Proclamation No. 5564, November 3, 1986	10
Section by Section Analysis of the Covenant to Establish a Commonwealth of the Northern Mariana Islands, Marianas Political Status Commission (1975)	12

REFERENCE TO OFFICIAL REPORTS OF OPINIONS

Lawrence M. Fleming v. Department of Public Safety, Commonwealth of the Northern Mariana Islands, 837 F.2d 401 (9th Cir., 1988)

STATEMENT OF GROUNDS FOR JURISDICTION

Date of Opinion - January 21, 1988

Date of amended Opinion - April 8, 1988

Date of Order denying rehearing - April 11, 1988

Statutory Provision Conferring Jurisdiction - 28 USC Section 1254(1)

CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES

Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, reprinted as amended at 48 USC Section 1681 (West 1987).

ARTICLE I
Political Relationship

Section 101. The Northern Mariana Islands upon termination of the Trusteeship Agreement will become a self-governing commonwealth to be known as the "Commonwealth of the Northern Mariana Islands," in political union with and under the sovereignty of the United States of America.

Section 102. The relations between the Northern Mariana Islands and the United States will be gov-

erned by this Covenant which, together with those provisions of the Constitution, treaties and laws of the United States applicable to the Northern Mariana Islands, will be the supreme law of the Northern Mariana Islands.

Section 103. The people of the Northern Mariana Islands will have the right of local self-government and will govern themselves with respect to internal affairs in accordance with a constitution of their own adoption.

Section 104. The United States will have complete responsibility for and authority with respect to matters relating to foreign affairs and defense affecting the Northern Mariana Islands.

Section 105. The United States may enact legislation in accordance with its constitutional processes which will be applicable to the Northern Mariana Islands, but if such legislation cannot also be made applicable to the several States the Northern Mariana Islands must be specifically named therein for it to become effective in the Northern Mariana Islands. In order to respect the right of self-government guaranteed by this Covenant the United States agrees to limit the exercise of that authority so that the fundamental provisions of this Covenant, namely Articles I, II and III and Sections 501 and 805, may be modified only with the consent of the Government of the United States and that Government of the Northern Mariana Islands.

Article IV
Judicial Authority

Section 402.
(a) The District Court for the Northern Mariana Islands will have the jurisdiction of a district court of the United States, except that in all causes arising under the Constitution, treaties or laws of the United States it will have jurisdiction regardless of the sum or value of the matter in controversy.

Article V
Applicability of Clauses

Section 501.
(a) To the extent that they are not applicable of their own force, the following provisions of the Constitution of the United States will be applicable within the Northern Mariana Islands as if the Northern Mariana Islands were one of the several States: Article I, Section 9, Clauses 2, 3 and 8; Article I, Section 10, Clauses 1 and 3; Article IV, Section I and Section 2, Clauses 1 and 2; Amendments 1 through 9, inclusive; Amendment 13; Amendment 14, Section 1; Amendment 15, Amendment 19; and Amendment 26; provided, however, that neither trial by jury or indictment by grand jury shall be required in any civil action or criminal prosecution based on local law, except where required by local law. Other provisions of or amendments to the Constitution of the United States, which do not apply of their own force within the Northern Mariana Islands, will be applicable within the Northern Mariana Islands only with the approval of the Government of the Northern Mariana Islands and of the Government of the United States.

Section 502

(a) The following laws of the United States in existence on the effective date of this Section and subsequent amendments to such laws will apply to the Northern Mariana Islands, except as otherwise provided in this Covenant:

(1) those laws which provide federal services and financial assistance programs and the federal banking laws as they apply to Guam; Section 228 of Title II and Title XVI of the Social Security Act as it applies to the several States; the Public Health Service Act as it applies to the Virgin Islands; and the Micronesian Claims Act as it applies to the Trust Territory of the Pacific Islands;

(2) those laws not described in paragraph (1) which are applicable to Guam and which are of general application to the several States as they are applicable to the several States; and

(3) those laws not described in paragraphs (1) or (2) which are applicable to the Trust Territory of the Pacific Islands, but not their subsequent amendments unless specifically made applicable to the Northern Mariana Islands, as they apply to the Trust Territory of the Pacific Islands until termination of the Trusteeship Agreement, and will thereafter be inapplicable.

42 USC Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws,

shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Lawrence M. Fleming commenced this action under 42 USC Section 1983 in the United States District Court for the Northern Mariana Islands, alleging that the Commonwealth of the Northern Mariana Islands (CNMI), through its Department of Public Safety, had deprived him of property rights without due process of law by making false allegations that Fleming was involved in drug trafficking in order to deprive him of a job opportunity with the Department of Public Safety.

The district court denied the CNMI's motion to dismiss on sovereign immunity grounds. A jury returned a verdict in favor of Fleming in the amount of $80,000. On appeal to the Ninth Circuit Court of Appeals, the court ruled that the Commonwealth was subject to suit under 42 USC Section 1983, and that the Commonwealth had impliedly waived its common law sovereign immunity by entering into the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America (Covenant). The court further ruled that the 11th Amendment to the United States Constitution was not applicable to the Commonwealth. The damages award was set aside because Fleming had proved no cognizable injury.

This case presents the paramount issues of inherent immunity of the Commonwealth from suit, under principles of common law and of the law of nations. In addition, applicability of 42 USC Section 1983 to the Commonwealth is an issue in the case.

Jurisdiction in the district court was alleged pursuant to USC Section 1694(a); 28 USC Section 1343; 28 USC Section 1331, and 42 USC Section 1983.

ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

A. Jurisdiction of the federal courts does not extend to actions by a citizen against the Commonwealth of the Northern Mariana Islands (CNMI).

1. Historical relationship of the CNMI and the United States.

The relationship of the Northern Mariana Islands to the United States is unique. A full understanding of that relationship is vital to resolution of this case, and for that reason a summary of salient points is now set forth. Historical detail is drawn from the following sources: Senate Report No. 94-596, U.S. Code Congressional and Administrative News 1976, pp. 449-52; League of Nations—Official Journal, January February 1921, pp. 87-88; I Hackworth, Digest of International Law, p. 125 (U.S. Government Printing Office, 1940); Gale v. Andrus, 643 F.2d 826, 828-30 (D.C. Cir. 1980); Commonwealth of the Northern Mariana Islands v. Atalig, 723 F.2d 682, 684-85 (9th Cir. 1984); U.S. v. Covington, 783 F.2d 1052, 1055 (9th Cir. 1985).

Following their discovery by Magellan in 1521 and later conquest by Spain, the Northern Marianas and Guam were subjected to Spanish rule. At the end of the Spanish-American War, Guam was ceded to the United States, and became and remains a U.S. territory. In contrast, the

Northern Mariana Islands were sold by Spain to Germany in 1899, and remained under German control until seized by the Empire of Japan in 1914. Later, the Japanese occupation was legitimatized by a League of Nations mandate in 1920 and agreed to by the United States. Japan then ruled the Northern Marianas until liberation by United States forces in 1944 in some of the bloodiest fighting of the war in the Pacific.

Upon formation of the United Nations, responsibility for the former Japanese mandated Islands was assumed by the UN. Consistent with the policy of the United States that it sought no lands by conquest as a result of World War Two and that it also sought to hasten the end of former colonial empires, the United States accepted responsibility from the UN as administering authority for the former Japanese Mandated Islands, to be known as the Trust Territory of the Pacific Islands (TTPI). The TTPI consisted of the Marshall Islands, the Carolines, and the Northern Mariana Islands. Guam remained a U.S. territory and was not a part of the TTPI. The United Nations Charter provisions governing United States responsibility toward the Northern Mariana Islands and the rest of the TTPI include the following:

> Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:

> a. to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protections against abuses;
>
> b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement; . . .
>
> Article 73, United Nations Charter, 59 Stat. 1031, 1048, T.S. No. 993 (1945), reprinted at I Commonwealth Code p. A-101.

Consistent with the nature of the relationship and the trust accepted by the United States, it has always been true that

> . . . the Trust Territory [including the Northern Mariana Islands] is not a territory or possession, because technically *the United States is a trustee rather than a sovereign.*
>
> People of Saipan v. United States Dept. of Interior, 502 F.2d 90, 95 (9th Cir. 1974), cert. den. 420 U.S. 1003, 95 S.Ct. 1445, 43 L.Ed.2d 761 (1975). (emphasis added)

In Gale v. Andrus, 643 F.2d 826, 830 (D.C. Cir. 1980), the court observed:

> The ultimate fact of importance to this Court is that the entire authority of the United States in the Trust Territory is derived from a *trust.*

> The real authority over the Islands remains in the United Nations. For all intents and purposes, the United States acts only as an administrator for a principal. . . . The task of the United States under the Trusteeship Agreement at issue is primarily to nurture the Trust Territory toward self-government.

2. Negotiation of the Covenant.

To fulfill its obligations under the United Nations trust, in 1969 the United States entered into negotiations with the people of the Trust Territory, seeking agreement on the future political status of the Trust Territory as a whole. By 1972 it was apparent that a single agreement could not be achieved, and because a closer relationship to the United States was desired by the people of the Northern Marianas, negotiations toward establishment of a Commonwealth of the Northern Mariana Islands were undertaken between representatives of the people of the NMI and the United States. On February 15, 1975, the covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America was signed by the representatives. The Marianas District Legislature subsequently approved the Covenant. Ninety-five percent of the people of the Northern Mariana Islands eligible to vote were registered, and 95 percent of these voted in a plebiscite in which the Covenant was approved by a 78.8 per cent favorable vote. Legislative History, P.L. 94-241, U.S. Code Congressional and Administrative News, 94th Congress Second Session 1976, pp. 449-52. Thereafter, and as provided by the Covenant, by joint resolution the Covenant was approved by the

Congress of the United States. H.J.Res. 549, P.L. 94-241; 90 Stat. 263, March 24, 1976.

The Covenant prescribes the effective dates of its provisions. Covenant section 1003. Pursuant to the Covenant, the Commonwealth Constitution was drafted and adopted by the people of the Commonwealth, and the Commonwealth technically came into existence on January 9, 1978, with the approval of its constitution by President Carter. Proclamation No. 4534, October 24, 1977. Termination of the UN Trusteeship was expressly provided to be by proclamation of the President of the United States. Covenant, sections 1002, 1003. This proclamation was issued by President Reagan on November 3, 1986, Proclamation No. 5564, 51 Fed. Reg. 40,399 (1986).

3. Nature of the present relationship between the Commonwealth of the Northern Mariana Islands and the United States.

We have shown above that the Covenant represents the evolution of the Northern Mariana Islands from subject people to re-emerged sovereignty. Indeed, the Preamble to the Covenant itself recognizes that its approval

> . . . by the people of the Northern Mariana Islands in a plebiscite, constitut[es] on their part a sovereign act of self-determination.

The Commonwealth of the Northern Mariana Islands is not and never has been a territory of the United States. Unlike Guam, its existence and political sovereignty are not creatures of the United States.

In Ngiraingas v. Sanchez, ___F.2d ___(9th Cir. No. 86-2840, June 7, 1988), the court of appeals con-

trasted the status of the Territory of Guam and the CNMI. The court noted that, unlike the states,

> Guam marches squarely to the beat of the federal drummer; the federal government bestows on Guam its powers and, unlike the states, which retain their sovereignty by virtue of the Constitution, Guam's sovereignty is entirely a creation of federal statute. Ngiraingas v. Sanchez, *supra*, slip op. at 6.

The *Ngiraingas* court went on to observe that:

> CNMI has a unique relationship with the United States; the original Trusteeship Agreement obligated the United States to "promote the development of the inhabitants of the trust territory toward self-government or Independence;" [citation omitted] Significantly, "the United States does not possess sovereignty over the Trust Territory" . . . [citations omitted]. *Guam has no separate sovereign status; unlike CNMI,* it "is subject to the plenary power of Congress and [*Guam*] *has no inherent right to govern itself,*". . . . Ngiraingas, *supra,* n.1, slip op. at 7-8 (emphasis added).

In its analysis of the case now before the Court, the court of appeals first looked to the Covenant. It found that the Eleventh Amendment to the U.S. Constitution was not listed in section 501(a) of the Covenant and that Eleventh Amendment "immunity" was thus not available to the Commonwealth.

But the court then concluded that the absence of the Eleventh Amendment from section 501(a) demonstrated an *implied waiver* by the Commonwealth of its common law sovereign immunity from suit.

Fleming v. Department of Public Safety, 837 F.2d 401, ___(9th Cir. 1988). See Appendix, pp. 12a-14a.

In a critical oversight, the court of appeals failed to note that *U.S. Constitution Article III itself also is not enumerated in the Covenant.* Of course, this does not suggest that the judicial power of the United States is not present in the Commonwealth. Neither Article III nor the Eleventh Amendment need be specifically listed in Covenant, since the judicial power of the United States, as expressed in Article III and as amended and limited in the Eleventh Amendment, is present in the Commonwealth by virtue of Covenant section 402(a):

> The District Court for the Northern Mariana Islands will have the jurisdiction of a district court of the United States. . . .

Beyond question, the "jurisdiction of a district court of the United States" is exactly what is established by Article III *and* the Eleventh Amendment. It is neither greater nor lesser with respect to the Northern Mariana Islands than it is with respect to the several states. The jurisdiction of the federal court to entertain a suit by a citizen against the government of the Northern Mariana Islands is as limited as is the jurisdiction of a federal court sitting in any state to hear a suit by a citizen against that state. In short, Article III, the Eleventh Amendment, and the long line of cases dealing with sovereign immunity all have effect in and with respect to the Commonwealth by reason of Covenant section 402(a).

Covenant section 402(a) is further explained by its framers and in the legislative history in the United States Congress, as follows:

> Subsection [402](a) provides that the District Court for the Northern Marianas will have the same jurisdiction as a district court of the United States *in a state of the union.*
>
> Section by Section Analysis of the Covenant to Establish a Commonwealth of the Northern Mariana Islands, Marianas Political Status Commission (1975) p. 34. (emphasis added.) (See identical phrasing in House Committee Report on section 402(a).)

The precipitate and unjustifiable conclusion of the court of appeals, that by adopting the Covenant the people of the CNMI impliedly waived sovereign immunity from suit in federal court, is counter to the solemn undertakings of the United States as trustee of the United Nations Trust Territory of the Pacific Islands. It results from approaching the relationship of the Commonwealth and the United States from an entirely incorrect basis.

The court of appeals read the Covenant as if it were an enumeration of powers and rights reserved to the Commonwealth, so that any power not reserved to the Commonwealth was necessarily retained by or granted to the United States.

Quite the contrary. For the Covenant to be properly perceived as the fulfillment of the "sacred trust" accepted under the United Nations Charter by the United States, it must be seen as the unique undertaking of two sovereigns, the United States and the people of the Commonwealth, to form a political union. Recognition in Covenant section 101 of the sovereignty of the United States in the relationship no more removes the incidents of the Commonwealth's

sovereignty than does the sovereignty of the United States remove the incidents of sovereignty of the several States of the Union.

The powers and incidents of sovereignty not granted expressly or by necessary implication are denied to the United States and are reserved to the people of the Northern Marianas or to their Commonwealth government.

This is the essence of the Tenth Amendment to the U.S. Constitution. This Court has previously noted the parallel between the Tenth and Eleventh Amendments in the context of state immunity from suit in federal court. See Welch v. Texas Dept. of Highways and Public Transp., ___U.S. ___, 107 S.Ct. 2941, 2951. n.14, ___L.Ed.2d ___(1987). The Tenth Amendment is also not enumerated in the Covenant, and would not appropriately have been, since it deals entirely with powers delegated to the United States by the Constitution. Nevertheless, its principle of retained powers is essential to the viability of the union of free and self-governing peoples established by the Covenant.

If the people's approval of the Covenant is twisted into a wholesale relinquishment of sovereignty, then the "sovereign act of self-determination" would be subverted and the fulfillment by the United States of its obligations under the Trusteeship Agreement would become a mockery. Just as the people and states of the Union retained those rights and powers not delegated to the United States, so must the Commonwealth have retained those rights and powers not entrusted to the United States in the Covenant.

Among the incidents of sovereignty inherent in the Commonwealth and not surrendered expressly or by

implication in the Covenant, is the immunity of the sovereign from suit without its consent. As noted by this Court, the framers of the U.S. Constitution clearly recognized this principle:

> Hamilton, in The Federalist, No. 81, made the following emphatic statement of the general principle of immunity: "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.* This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal." Monaco v. Mississippi, 292 U.S. 313, 323-25, 54 S.Ct. 745, 78 L.Ed. 1282 (1934), quoted in Edelman v. Jordan, 415 U.S. 651, 660 n.9, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974).

The inherent immunity of a sovereign from suit was well-recognized at the time of adoption of the United States Constitution:

> Our review of the cases discloses nothing which would indicate that a right of jury trial existed under the common law in 1791 with respect to a suit against a foreign government, since, because of its recognized sovereign immunity, such a suit could not be maintained at all.
>
> That a suit against a foreign state was unknown to the common law in this country is clear from the opinions in The Schooner Exchange v. McFaddon [7 Cranch 116 (1812)] and Berizzi Bros.

> Co. v. S.S. Pesaro [271 US 562]. The recognition of the immunity of a foreign sovereign in this country paralleled the common law of England. Although it is extremely doubtful that the King of England was ever suable without his consent, the authorities agree that, in any event, no such right of action existed after the reign of Edward I (1272-1307).
>
> Williams v. Shipping Corp. of India, 653 F.2d 875, 881 (4th. Cir. 1981).

This Court has recognized that "the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III." Pennhurst State School v. Halderman, 465 U.S. 89, 98, 79 L.Ed.2d 67, 104 S.Ct. 900 (1984). The fundamental nature of sovereign immunity requires that a state's waiver of immunity be *unequivocally expressed*, Pennhurst, supra, 465 U.S. at ___; Welch v. Texas Dept. of Highways, ___U.S. ___, 97 L.Ed.2d 389, 107 S.Ct. 2941, 2945 (1987); Edelman v. Jordan, 415 U.S. 651, 673, 39 L.Ed.2d 662, 94 S.Ct. 1347 (1974). On reasoning which can be characterized as circular at best, the court of appeals here held that by approving the Covenant without an express inclusion of the Eleventh Amendment therein, the people of the Northern Mariana Islands not only forsook Eleventh Amendment immunity but impliedly waived common law sovereign immunity as well. Such an implied waiver, or "constructive consent," conjured from so flimsy a premise simply ignores the strong requirements of the rulings of this Court. It also ignores the history and context of the evolution of the Covenant and the Commonwealth in relation to the United States.

Furthermore, at the time of negotiating and adopting the Covenant, all U.S. territories enjoyed sovereign immunity. See e.g., 48 USC § 1421a (Guam); 48 USC § 1541(b) (Virgin Islands); Litton Industries, Inc. v. Colon, 587 F.2d 70 (1st Cir. 1978) (Puerto Rico). It is inconceivable that the sovereign immunity of the Commonwealth from a citizen's suit in federal court was intended to be waived without even being mentioned. Far more certain is that it was presumed and expected to continue, under the provisions of Covenant sections 103 and 402(a).

In reversing a holding of the court of appeals that the state of Illinois had "constructively consented" to a waiver of Eleventh Amendment immunity from suit by participating in a federal program and administering federal funds, this Court held:

> *Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights,* and we see no place for it here. In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, *we will find waiver only where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction"* Murray v. Wilson Distilling Co., 213 US 151, 171, 53 L.Ed 742, 29 S.Ct. 458 (1909). We see no reason to retreat from the court's statement in Great Northern Insurance Co. v. Read, 322 US, at 54, 88 L.Ed 1121 (footnote omitted);
>
> "[W]hen we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declara-

> tion of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found."
>
> Edelman v. Jordan, supra, 415 US, at 673 (emphasis added)

While the issue in *Edelman* was relinquishment of Eleventh Amendment immunity by a state, the same analysis and indeed a greater reluctance, should obtain in the context of this case: the asserted "implied waiver" by the people of the Northern Mariana Islands of a fundamental incident of their sovereignty.

B. 42 USC § 1983 does not apply to the Commonwealth of the Northern Mariana Islands.

1. The Covenant establishes a test for applicability of federal laws to the Commonwealth, and 42 USC § 1983 does not pass that test.

The Covenant establishes a two-pronged test for applicability of existing federal laws to the Commonwealth. Covenant Section 502(a)(2) makes applicable to the Commonwealth:

> (2) those laws . . . which are applicable to Guam *and* which are of general application to the several States *as* they are applicable to the several States; . . . (emphasis added)

42 USC § 1983 does not apply to Guam because Guam is not a "person" as defined in that law. Ngiraingas v. Sanchez, ___F.2d ___, slip op. at 8, (9th Cir., No. 86-2840, June 7, 1988). 42 USC § 1983 is also ineffective with respect to the several states because of the doctrine of sovereign immunity. U.S. Constitution, Amendment 11; Quern v. Jordan, 440 U.S. 332, 59 L.Ed.2d 358, 99 S.Ct. 1139 (1979); Edel-

man v. Jordan, 415 U.S. 651, 39 L.Ed. 2d 662, 94 S.Ct. 1347 (1974). Therefore 42 USC § 1983 cannot apply to the Commonwealth of the Northern Mariana Islands.

Even if the Commonwealth were found to be a "person," the inapplicability of 42 USC § 1983 to Guam requires that the law not apply to the Commonwealth. To find otherwise would violate the express restriction of Covenant section 502(a)(2), quoted above, and the fundamental axiom of Covenant section 102:

> *The relations between the Northern Mariana Islands and the United States will be governed by this Covenant* which, together with those provisions of the Constitution, treaties and laws of the United States applicable to the Northern Mariana Islands, will be the supreme law of the Northern Mariana Islands. (emphasis added.)

This concept is so crucial and so basic to the relationship between the Commonwealth and the United States that it is among those

> . . . fundamental provisions of this Covenant . . . [which] may be modified only with the consent of the Government of the United States and the Government of the Northern Mariana Islands. Covenant section 105.

Thus, application of 42 USC § 1983 to the Commonwealth is not a question of whether the CNMI is a "person". Nor is it a question of immunity of the Commonwealth government from suit in federal court. The issue is applicability of 42 USC § 1983 in light of the test of Covenant section 502(a)(2). 42 USC § 1983 fails to pass that test. It therefore cannot apply

to the Commonwealth of the Northern Mariana Islands.

2. Even if the law were otherwise applicable, the CNMI is not a "person" under 42 USC § 1983.

There is a split among the courts of appeal as to whether a state is a "person" under 42 USC § 1983. See, e.g., Della Grotta v. State of Rhode Island, 781 F.2d 343 (1st Cir. 1986) (State a person under 42 USC § 1983); Toledo, Peoria & Western R. Co. v. State of Illinois, 744 F.2d 1296, 1298 (7th Cir. 1984) (State agency not a person under 42 USC § 1983; 3rd, 5th and 9th circuits agree.)

The court of appeals in this case, having held that the CNMI lacked Eleventh Amendment immunity from suit, further held that the absence of such immunity made the CNMI a "person" under the statute. Fleming, supra, 837 F.2d at ___, slip op. at 11-12 & n.6, appendix pp. 10a-11a. Indeed, the court deems Eleventh Amendment Immunity the test of "personhood." This falls to recognize the "dual nature" of the inquiry: (1) is the political entity immune?, and (2) is the state a "person" under the statute? Della Grotta v. State of Rhode Island, *supra*, 781 F.2d, at 348 & n.6.

Thus, although the court of appeals noted: "Clearly, the Commonwealth possesses far more of the attributes of statehood than of a local government, . . ." Fleming, n.6, appendix p. 11a, the panel then effectively reduced the Commonwealth to the status of a county or city, a mere creature of a superior sovereignty such as a state, in complete derogation of the Covenant.

If indeed sovereign immunity from suit is the test of "personhood" under 42 USC § 1983, then the CNMI is not a person because it possesses such immunity, as recognized by Covenant section 402(a), and as discussed above in detail. If such immunity is not the test, then the same analysis which concludes that states and the federal government are not persons under the act applies to exclude the CNMI from that status. Ngiraingas v. Sanchez, *supra.* While the CNMI is comparatively small in size and population, it is a constitutionally established sovereign government, similar in nearly every respect to a state. It is not the sole organ of government in the Northern Mariana Islands, but has under it various local governmental entities and public corporations. Marianas Constitution Articles VI and XI. The CNMI is no more to be deprived of its state-like attributes by reason of its size than should relative size be the test of "person" status as among the states themselves.

C. Conclusion: The Court should grant certiorari to review this case.

The issues presented by this case are of great moment, not just to the people of the Commonwealth, but to the United States before the nations of the world, showing the ultimate evolution of the sacred trust accepted by the United States as regards the Pacific Islands. Indeed, the United States is even now negotiating the possibility of commonwealth status with other peoples of the former Trust Territory of the Pacific Islands, specifically the Republic of Palau. Less close affiliations have likewise been achieved with other emerging peoples of the Pacific Islands, for example, The Federated States of Micronesia (Compact of Free Association).

The manner in which the United States interprets the fundamental document regarding its relationship with the Commonwealth of the Northern Mariana Islands is thus of great significance, certainly to the immediate parties, but as well to the people and polities of the Pacific Islands and to the people of the United States, bound as they are in political union with the CNMI.

The question of applicability of 42 USC § 1983 to the CNMI presents issues of great national importance, resolving the conflict in the circuits as to the "person" status of a state-like political entity, the Commonwealth, and reaffirming the *bona fides* of the United States in adhering to the provisions of the Covenant with respect to application of federal laws to the Commonwealth.

Petitioner prays that the Court grant certiorari for review of this case.

Respectfully submitted:

ALEXANDRO C. CASTRO
Attorney General

DAVID A. WEBBER
ERIC S. SMITH
RICHARD WEIL
STEPHEN A. COHEN
Assistant Attorneys General

Commonwealth of the
Northern Mariana Islands

APPENDIX

APPENDIX A

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-2694
DC No. CV 84-0006 AL

LAWRENCE M. FLEMING,
Plaintiff-Appellee,

v.

DEPARTMENT OF PUBLIC SAFETY, COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Defendant-Appellant.

FILED
APR 11 1988

ORDER

Before: NELSON, REINHARDT and WIGGINS, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b). The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX B

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-2694
DC No. CV 84-0006 AL

LAWRENCE M. FLEMING,
Plaintiff-Appellee,

v.

DEPARTMENT OF PUBLIC SAFETY, COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Defendant-Appellant.

AMENDED OPINION

Appeal from the United States District Court for the District of the Northern Mariana Islands Alfred Laureta, District Judge, Presiding

Argued and Submitted November 6, 1986
Honolulu, Hawaii

Filed: January 21, 1988
Amended: April 8, 1988

Before: NELSON, REINHARDT and WIGGINS, Circuit Judges

Opinion by Judge Reinhardt

Reinhardt, Circuit Judge:

The Department of Public Safety of the Commonwealth of the Northern Mariana Islands ("Commonwealth" or "Northern Marianas") appeals a jury verdict awarding

$80,000 to Lawrence Fleming in a civil rights action under 42 U.S.C. § 1983 (1982). We agree with the district court that the Commonwealth does not enjoy eleventh amendment immunity from suits and can therefore be sued under section 1983. However, because we find that Fleming has suffered no cognizable injury, we conclude that appellant's motion for judgment notwithstanding the verdict ("j.n.o.v.") should have been granted.

I. Background

In January 1984, Fleming along with several others applied for the job of Police Officer I with the Department of Public Safety. Because there were approximately 16 vacancies at that time, and at least that many applicants, the Department set up four person Police Boards to interview applicants. These Boards recommended qualified candidates to the Director of the Department, who further reviewed applications. The Personnel Office conducted whatever further review that was warranted.

On January 18, 1984, Fleming interviewed with the Department for employment as a police officer. While his application was being considered, the Police Board received information connecting Fleming to drug dealing. On January 25, a member of the Board telephoned the Drug Enforcement Agency in Guam to determine the accuracy of the allegations. He was advised that the allegations were false and the Board recommended Fleming along with several others to the Director of Public Safety.

On January 26, 1984, a memorandum was issued listing the individuals who were to be hired by the Department. Fleming was not included. The Director had delayed recommending Fleming to the Director of Personnel pending his own further consideration of the matter. One week later, on February 3, 1984, the Director sent Fleming's application to the Personnel Office for approval. On February 7, 1984, the Personnel Office contacted Fleming to

offer him a position with the Department. Fleming responded that he did not want the job because his career on the police force would be tarnished by the drug allegations. Also, police academy training had already begun by this time, and, according to Fleming, he did not want to start the academy late.

Later in 1984, Fleming brought suit against the Department in the District Court for the Northern Mariana Islands. He alleged that the Department's handling of his application deprived him of his constitutional rights to due process and equal protection in violation of section 1983. After a trial on the merits, a jury agreed, and awarded him $80,000 in damages.

The Department then moved for a j.n.o.v. on the ground that the sovereign immunity afforded the states under the eleventh amendment and under common law is applicable to the Commonwealth, thereby making the Commonwealth immune from suit under section 1983. The Department also claimed that appellee did not suffer constitutional harm violative of section 1983. The district court denied the motion. The Department timely appeals under 48 U.S.C. § 1694(c) (1982).

II. The Commonwealth's Relationship with the United States

At the time of the filing of Fleming's suit, two documents defined the Commonwealth's relationship with the United States. The first, the Trusteeship Agreement for the Former Japanese Mandated Islands, *entered into force* July 18, 1947, 61 Stat. 3301, T.I.A.S. No. 1665, 8 U.N.T.S. 189 ("Trusteeship Agreement"), established the United States as the United Nations trustee of the Trust Territory of the Pacific Islands. (The Northern Mariana Islands were part of the Trust Territory.) The Trusteeship Agreement granted the United States "full powers of administration, legislation, and jurisdiction over the territory subject to

the provisions of this agreement," and allowed it to "apply to the trust territory . . . such of the laws of the United States as it may deem appropriate to local conditions and requirements." Trusteeship Agreement art. 3. The Trusteeship Agreement also obligated the United States to "promote the development of the inhabitants of the trust territory toward self-government or independence," *Id.* art. 6, § 1, and to "protect the rights and fundamental freedoms of all elements of the population without discrimination," *Id.* art. 6, § 3. *See generally Gale v. Andrus*, 643 F.2d 826, 828-30 (D.C. Cir. 1980) (further describing the Trusteeship Agreement).

The People of the Northern Mariana Islands in recent years have elected to enter into a closer relationship with the United States. On February 15, 1975, the United States and the Marianas Political Status Commission for the people of the Northern Mariana Islands signed the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, *reprinted as amended in* 48 U.S.C.A. § 1681 (West 1987) ("Covenant"), and Congress thereafter approved the Covenant. Act of Mar. 24, 1976, Pub. L. No. 94-241, 90 Stat. 263. The Covenant establishes the Commonwealth and defines its political relationship with the United States. *See generally Commonwealth of the Northern Mariana Islands v. Atalig*, 723 F.2d 682, 685 (9th Cir.) (describing terms of Covenant), *cert. denied*, 467 U.S. 1244 (1984). In 1984, most of the provisions of the Covenant were in effect. *Id.; see* Covenant § 1003. It is the terms of that document that are dispositive here.

Trust Territories are *sui generis*. Each one must be viewed independently to determine the rights granted to its citizenry, the rights reserved to itself, and those possessed by the federal government. *See, e.g., Com. of Northern Marianas v. Atalig*, 723 F.2d 682, 684-85 (9th Cir. 1984). Accordingly, we must examine the Covenant care-

fully to determine the precise nature of the Commonwealth's governance.[1]

III. Applicability of Section 1983 to the Commonwealth

Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1982). In its appellate briefs, the Department did not dispute that section 1983 applies in the Commonwealth.[2] We agree. Section 502(a)(2) of the Cov-

---

[1] During this appeal, on November 3, 1986, the President of the United States proclaimed the Trusteeship Agreement terminated with respect to the Commonwealth. Proclamation No. 5564, 51 Fed. Reg. 40,399 (1986); *see* Covenant § 1002 (President will issue proclamation terminating the Trusteeship Agreement). The Covenant states that its provisions not effective upon its approval or upon Presidential proclamation become effective upon termination of the Trusteeship Agreement. Covenant § 1003(c). Any change in the Commonwealth's status resulting from the President's November 3, 1986, proclamation does not affect the following analysis of the Covenant, because the relevant provisions of the Covenant—sections 501 and 502—were already in effect at the time of the filing of this suit. *See* Proclamation No. 4534, § 2, 42 Fed. Reg. 56,593, 56,594 (1977) (Covenant §§ 501, 502 effective on January 9, 1978).

[2] The Department raised this issue for the first time in its petition for rehearing and rehearing en banc. Courts of appeals ordinarily will not consider for the first time on rehearing issues not presented by the parties in their appellate briefs. *Escobar Ruiz v. I.N.S.*, 813 F.2d 283, 286 (9th Cir. 1987), *aff'd*, No. 83-7502 (9th Cir. Feb. 1988) (en

enant expressly makes those laws applicable to Guam and "of general application to the several States" applicable to the Commonwealth.[3] Because section 1983 is applicable to Guam, *see, e.g., Bunyan v. Camacho*, 770 F.2d 773 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 3271 (1986), and also to the states, we find that section 1983 applies to the Commonwealth. *See also* Proclamation No. 5207, § 5(m), 49 Fed. Reg. 24,365, 24,368 (1984) (U.S. citizenship not required for citizens of the Northern Mariana Islands to bring suit under section 1983).

---

banc) (citing *Partenweederei, MS Belgrano v. Weigel*, 313 F.2d 423, 425 (9th Cir. 1962)). A case must involve " 'extraordinary circumstances' " to justify our consideration of issues first raised on petition for rehearing. *Id.* at 286 (quoting *United States v. Southerland*, 428 F.2d 1152, 1158 (5th Cir. 1970) and citing *Moore v. United States*, 589 F.2d 439, 441-42 (5th Cir. 1979)). While the issue here likely does not meet this threshold, we observe that the Department's arguments are not persuasive. The Department states that section 1983 does not apply in the Commonwealth because section 1983 does not apply in Guam, and cites a district court decision from the Territory of Guam that holds that Guam is not a "person" under section 1983. *Ignacio v. Salas*, No. 79-0118 (D. Guam 1982). However, in *Bunyan v. Camacho*, 770 F.2d 773 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 3271 (1986), we said that section 1983 is applicable in Guam and reversed a summary judgment motion denying relief. *Bunyan* is controlling here, and in our view reaches the proper result.

[3] Section 502(a) provides, in relevant part:

> The following laws of the United States in existence on the effective date of this Section [January 9, 1978] and subsequent amendments to such laws will apply to the Northern Mariana Islands, except as otherwise provided in this Covenant:
>
> . . .
>
> (2) those laws . . . which are applicable to Guam and which are of general application to the several States as they are applicable to the several States. . . .

IV. Application of the Eleventh Amendment to the Commonwealth[4]

Suits against states under section 1983 are severely limited by the eleventh amendment. When, under section 1983, a citizen sues a state in its own name in federal court, the suit cannot proceed unless the state has waived its sovereign immunity and thereby consented to the suit. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 98-99 (1984); *Alabama v. Pugh*, 438 U.S. 781, 782 (1978) (per curiam). Thus, we must consider whether the Commonwealth, like the states, enjoys sovereign immunity under the eleventh amendment. A close examination of the Covenant convinces us that its drafters intended that the Commonwealth not enjoy such immunity.

Section 501(a) of the Covenant expressly enumerates those provisions of the United States Constitution that "will be applicable within the Northern Mariana Islands as if the Northern Mariana Islands were one of the several States." The eleventh amendment is conspicuously absent. Section 501(a) provides in full:

> To the extent that they are not applicable of their own force, the following provisions of the Constitution of the United States will be applicable within the Northern Mariana Islands as if the Northern Mariana Islands were one of the several States: Article I, Section 9, Clauses 2, 3, and 8; Article I, Section 10, Clauses 1 and 3; Article IV, Section 1 and Section 2, Clauses 1 and 2; Amendments 1 through 9, inclusive; Amendment 13; Amendment 14, Section 1; Amendment 15; Amendment 19; and Amendment 26; provided, however, that neither trial by jury

---

[4] We address this issue first because it is jurisdictional. *See M.C. & L.M. Railway Co. v. Swan*, 111 U.S. 379, 382 (1884), and *Hans v. Louisiana*, 134 U.S. 1 (1890).

> nor indictment by grand jury shall be required in any civil action or criminal prosecution based on local law, except where required by local law. Other provisions of or amendments to the Constitution of the United States, which do not apply of their own force within the Northern Mariana Islands, will be applicable within the Northern Mariana Islands only with approval of the Government of the Northern Mariana Islands and of the Government of the United States.

From the specificity with which the applicable provisions of the United States Constitution are identified, it is clear that the drafters considered fully each constitutional amendment and article for inclusion in the Covenant. That they deliberately declined to include the eleventh amendment unequivocally demonstrates their desire that the Commonwealth not be afforded eleventh amendment immunity. As the Supreme Court long ago observed, "in an instrument well drawn, as in a poem well composed, silence is sometimes most expressive." *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 454 (1793) (opinion of Wilson, J.). Furthermore, neither the government of the United States nor of the Commonwealth has since approved any law, compact, or treaty that would have the effect of making the eleventh amendment applicable to the Commonwealth.

Under these circumstances, the most basic rule of statutory construction is that the plain language of the statute should be regarded as conclusive. *United States v. Mehrmanesh*, 689 F.2d 822, 828 (9th Cir. 1982) (citing *Bread Political Action Committee v. FEC*, 455 U.S. 577, 580-81 (1982)). Where the language of the Covenant is as clear as it is here, and the legislative history and purpose are not to the contrary, we may not impose eleventh amendment immunity on the Commonwealth. *See INS v. Cardoza Fonseca*, 107 S. Ct. 1207, 1213 n.12 (1987).

In reaching this conclusion, we have not ignored the language of section 502(a)(2). As discussed *supra*, section 502(a)(2) makes all laws, including section 1983, applicable to the Commonwealth "as they are applicable to the several States." The eleventh amendment is a fundamental limitation on the applicability of section 1983 to the states. Therefore, the argument goes, section 1983 as applied in the Northern Marianas is also subject to the eleventh amendment. A principal difficulty with this argument is that it leads to the inevitable conclusion that section 502(a)(2) incorporates the eleventh amendment *in toto*, since all federal laws are subject to the eleventh amendment. We believe that had the drafters intended to make the eleventh amendment applicable in the Commonwealth, they would have done so directly in section 501(a), the section that enumerates all of the constitutional provisions applicable to the Commonwealth, rather than incorporating it *sub rosa* through section 502(a)(2). A plain reading of the Covenant indicates a separation between constitutional and nonconstitutional provisions. We simply cannot subvert the well defined parameters of sections 501(a) and 502(a)(2) absent clear legislative intent. Were we to incorporate the eleventh amendment through section 502(a)(2), we would reduce that amendment to a mere "law" "generally applicable to the states," as opposed to a constitutional provision. The eleventh amendment cannot fairly be characterized as such.[5]

We next consider whether the Commonwealth constitutes a "person" under section 1983. We address this issue because the Supreme Court has not expressly decided

---

[5] The Department also argues that the eleventh amendment is incorporated through section 501(a), which provides that certain constitutional provisions are "applicable of their own force." Absent any evidence that even suggests that the eleventh amendment constitutes such a provision, we cannot conclude that the drafters of the Covenant intended to incorporate the eleventh amendment *sub silentio* through this clause.

whether a state constitutes a person under the Act. *Quern v. Jordan*, 440 U.S. 332 (1979), limits the applicability of section 1983 to states solely upon the force of the eleventh amendment. The Court said that Congress would have had to have been far more explicit about overriding such immunity in order to subject states to suits under section 1983 without their consent. *Id.* at 343-45. Indeed, the Court in *Quern* distinguished *Monell* strictly on eleventh amendment grounds, noting that *Monell* is " 'limited to local government units which are not considered part of the State for Eleventh Amendment purposes.' " *Id.* at 338 (quoting *Monell*, 436 U.S. at 690 n.54). The law treats local governments differently from states under section 1983 not because local governments are somehow more like persons, but simply because local governments, unlike states, are not covered by the eleventh amendment. We conclude that governmental entities are persons for purposes of section 1983, but that those entities protected by the eleventh amendment remain immune from suits brought in federal court without their consent. Accordingly, while the Commonwealth enjoys many attributes of statehood, it may nevertheless be sued under section 1983; the Commonwealth is a person for purposes of that statute and, as we have concluded *supra*, it like local governments does not enjoy eleventh amendment immunity.[6]

We note that were states not persons under the Act, the issue of eleventh amendment immunity would not arise as it does in section 1983 cases involving states; the section would simply be inapplicable to the states by its terms. However, the issue in section 1983 suits against states is

---

[6] We do not in any way mean to suggest that the attributes of sovereignty enjoyed by the Commonwealth are similar to those of local governments. Clearly, the Commonwealth possesses far more of the attributes of statehood than of a local government entity. However, because the Commonwealth, like a local government, does not enjoy eleventh amendment immunity, it is more like a local government insofar as sovereign immunity is concerned.

whether the state has waived its eleventh amendment immunity. *See Pennhurst,* 465 U.S. at 99; *Pugh,* 438 U.S. at 782; *Spaulding v. University of Washington,* 740 F.2d 686, 694 (9th Cir.), *cert. denied,* 469 U.S. 1036 (1984). If a state may waive its immunity from suits brought under section 1983 and be liable for monetary damages, a state, and *a fortiori* a Trust Territory like the Commonwealth, must be subject to the statute and thus a person under section 1983.[7]

V. Common Law Sovereign Immunity and Section 1983

The Department also claims that the Commonwealth enjoys common law sovereign immunity, and that Fleming's suit is barred even if the eleventh amendment is not applicable. The Department cites *Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89 (1984), for the proposition that common law sovereign immunity constitutes an independent limitation on courts' Article III jurisdiction to hear cases against states. We do not reach this question, because we conclude that in entering into the Covenant the Commonwealth impliedly waived whatever immunity it might otherwise have enjoyed against suits in federal court arising under federal law.

---

[7] Even were we to accept the contrary argument that a state is not a person for purposes of section 1983, we would still conclude that the Commonwealth is. This is because the argument that a state is not a person is premised exclusively upon the fact that states enjoy eleventh amendment immunity. *See Quern,* 440 U.S. at 343. The contention is that Congress did not intend to include within the term "person" those governmental entities protected by the eleventh amendment. However, as we have discussed *supra,* the Commonwealth, like local government entities, does not have eleventh amendment immunity. Therefore it, like local governments, was intended to be included within the statute and is a person for purposes of section 1983. Thus, irrespective of whether a state constitutes a person under section 1983, the Commonwealth does, and so may be sued under that statute.

A waiver of a sovereign's immunity can be found by express language, or by clear implication from the text. *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (citing *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909)). To determine whether the Commonwealth has waived its sovereign immunity from suits arising under federal law in the federal courts, we must look to the Covenant and its supporting documents.

The most telling evidence of a waiver is found in section 501(a) of the Covenant. As we have discussed above, the drafters of the Covenant made a deliberate decision not to adopt the eleventh amendment when they omitted that amendment from section 501(a). By so doing, they affirmatively elected to subject the Commonwealth to federal suits in federal court. The omission of the eleventh amendment thus clearly signals a waiver of any common law sovereign immunity against federal suits; there is simply no meaningful distinction between eleventh amendment immunity and common law sovereign immunity insofar as federal suits are concerned. *See Demery v. Kupperman*, 735 F.2d 1139, 1145 (9th Cir. 1984) (citing *Pennhurst), cert. denied*, 469 U.S. 1127 (1985). Thus, when the drafters of the Covenant rejected the protections of the eleventh amendment, they must have also intended to forego any sovereign immunity from suit in federal court that the Commonwealth might otherwise enjoy. Otherwise, their decision to exclude the eleventh amendment would make little sense and have been of no practical effect.

Further evidence of an implied waiver is found in the Marianas Political Status Commission's authoritative study of the Covenant. Regarding section 103 guaranteeing the Commonwealth's right of self-government, the Marianas Political Status Commission found that "the Government of the Northern Mariana Islands will have sovereign immunity, so that it cannot be sued *on the basis of its own laws* without its consent." *Section by Section Analysis of the Covenant to Establish a Commonwealth of the Northern*

Mariana Islands 11 (1975) (emphasis supplied). The Commission's express statement regarding immunity from suit under Commonwealth laws and its omission of any reference to immunity from suit under federal laws constitutes persuasive evidence that, under the covenant, the Commonwealth does not retain sovereign immunity from federal suits.

Thus, because the Commonwealth is a person under section 1983, because it lacks eleventh amendment immunity and because in the Covenant it waived any common law sovereign immunity from federal suit it might otherwise have possessed, Fleming may bring a section 1983 suit against the Department.

VI. Section 1983 Claim

This appeal is from a motion for j.n.o.v. J.n.o.v. is proper if the evidence construed in the light most favorable to the nonmoving party permits only one reasonable conclusion as to the verdict and that conclusion is contrary to the jury's; it is improper if reasonable minds could differ over the verdict. *Peterson v. Kennedy,* 771 F.2d 1244, 1252 (9th Cir. 1985), *cert. denied,* 106 S. Ct. 1642 (1986). Even construing the facts in such a light, and there are many in this record that are conflicting, we conclude that the verdict in Fleming's favor cannot stand.

Unlike most section 1983 claimants, Fleming was offered a job with the Department. His complaint is that he was offered the job 11 days after several other persons received their offers. The delay was due at least in part to the fact that the Department was investigating allegations that Fleming was a drug dealer. When the Department concluded its investigation and offered Fleming the job, he declined to accept it because, he claimed, his work on the

police force would be forever compromised by the drug allegations.[8]

It is clear from the facts that Fleming has not suffered a cognizable injury. Under the due process clause of the fourteenth amendment, the government may not deprive a person of life, liberty or property without due process of law. Fleming was not, however, deprived of either a property or liberty interest that the Constitution protects. It is true that the right to "follow a chosen profession . . . comes within the 'liberty' and 'property' concepts" of the due process clause. *Chalmers v. City of Los Angeles*, 762 F.2d 753, 757 (9th Cir. 1985) (quoting *Greene v. McElroy*, 360 U.S. 474, 492 (1959)). But Fleming was offered the job of police officer, and so was not deprived of the opportunity to pursue his chosen profession. At most he was the victim of a brief delay while a reviewing authority considered whether the offer should be made. Fleming cites no cases suggesting that one who is offered a job after a brief delay can successfully allege a denial of a due process interest, and we can think of no reason why we should reach such a conclusion under the facts of this case.

Fleming also appears to allege that the offer of a position with the Department of Public Safety was ineffective or illusory because the Director of Public Safety believed him to be a drug dealer. Yet Fleming offered no evidence at trial that suggests that the February 7, 1984, offer of employment was not bona fide. Absent such evidence, or some other persuasive explanation as to why the Director's conduct precluded him from accepting or performing the

---

[8] Fleming contends that nine months later, a ranking officer in the Department told him that he still thought that he was a drug dealer. He also alleges that his wife, the Director of Public Safety's niece, contacted the Director while the application was still pending, and that the Director told her that he could not hire Fleming because of rumors that he was a drug dealer.

proffered position, Fleming has failed to establish even an arguable constitutional violation.

The only actual injury that Fleming may have sustained as a result of the Department's action is damage to his reputation. However, in *Paul v. Davis*, 424 U.S. 693 (1976), the Supreme Court, in a case involving facts far more glaring than those involved here,[9] concluded that the interest in reputation is, without more, "neither 'liberty' nor 'property' guaranteed against state deprivation without due process of law." *Id.* at 713. Thus, Fleming has not suffered any constitutional violation in this regard either. His action for any damages to his reputation lies, if anywhere, in the tort of defamation, and not in section 1983.[10]

Fleming's equal protection claim is similarly without merit. He contends that he was the only applicant of fourteen to be subjected to a Drug Enforcement Agency background check. Because this alleged harm does not involve a fundamental interest or a suspect or semi-suspect class, the rational basis standard of review is appropriate. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307,

---

[9] In *Paul*, police chiefs had circulated to approximately 800 merchants in the Louisville, Kentucky metropolitan area a flyer listing the names and photographs of "active" shoplifters. Petitioner's name was included on the list.

[10] Our cases suggest that in certain circumstances injury to reputation may implicate constitutional liberty interests. However, we have limited violations of liberty interests to those instances where an employee has been dismissed, and the reasons for dismissal have so stigmatized the person that his other employment opportunities have been jeopardized. *See, e.g., Clemente v. United States*, 766 F.2d 1358, 1365-66 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 881 (1986); *Loehr v. Ventura County Community College Dist.*, 743 F.2d 1310, 1317 (9th Cir. 1984); *Bollow v. Federal Reserve Bank*, 650 F.2d 1093, 1100-01 (9th Cir. 1981), *cert. denied*, 455 U.S. 948 (1982). Because Fleming was not dismissed from employment and because he began employment at another Commonwealth agency shortly after he decided not to accept a position with the Department, Fleming cannot establish a violation of a liberty interest.

312-14 (1976) (per curiam). While it may be true that Fleming was the only applicant to be subjected to a DEA check, there is no evidence in the record suggesting that there was any other applicant about whom the Department received reports of alleged drug activity. In light of the allegations against Fleming, it was not only rational but appropriate for the Department to investigate the allegations before offering to hire him.

For the foregoing reasons, we reverse the judgment of the district court, and remand with instructions to grant the Department's motion for judgment notwithstanding the verdict.

REVERSED AND REMANDED

APPENDIX C

**IN THE DISTRICT COURT
FOR THE
NORTHERN MARIANA ISLAND**

TRIAL DIVISION

CIVIL ACTION NO. 84-0006

LAWRENCE FLEMING,
Plaintiff,

vs.

DEPARTMENT OF PUBLIC SAFETY, AND
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Defendants.

FILED
SEP 18 1985

AMENDMENT TO DECISION

This Court's Decision filed on September 11, 1985 is hereby amended to read as follows:

Line 24, p.2, "notwithstanding the verdict where:"

Line 4, p.16, "degree of their sovereignty . . . ."

Line 6, p.22, "Commonwealth statute cannot rejuvenate. . . ."

Line 12, p.24, "(5th Cir. 1983) (the "liberty protected . . . encompasses an"

Line 10, p.26, "which is an unsatisfactory . . . ."

Line 11, p.40, "prosecution *based on local law,* except where required by local"

Line 12, p.40, "law. [emphasis added] In discussing the provision, the Status"

Line 22-1/2, p.40, "Art. 1, Sec. 8 of the Commonwealth Constitution provides:"

Line 18, P.32, "JUDGE ALFRED LAURETA"

DATED 18th day of September, 1985

ALFRED LAURETA
JUDGE ALFRED LAURETA

APPENDIX D

IN THE DISTRICT COURT
FOR THE
NORTHERN MARIANA ISLANDS

TRIAL DIVISION

CIVIL ACTION NO. 84-0006

LAWRENCE M. FLEMING,
Plaintiff,

vs.

DEPARTMENT OF PUBLIC SAFETY, AND
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Defendants.

FILED
SEP 11 1985

DECISION

The plaintiff Lawrence M. Fleming brings this action against the Department of Public Safety (Department) and the Commonwealth of the Northern Mariana Islands (Commonwealth) pursuant to 42 U.S.C. § 1983 for infringement of Fleming's rights of due process and equal protection arising out of the defendants' refusal to hire Fleming as a Police Officer I. On June 25, 1985, following a jury trial, a verdict was rendered for Fleming in the amount of $80,000.00. Judgment was entered on this verdict on July 1, 1985.

The defendants now bring a motion for judgment notwithstanding the verdict in which they raise the following issues:

1. Whether 42 U.S.C. § 1983 applies to the Commonwealth and its agencies;
2. Whether this action is barred by the Eleventh Amendment;
3. Whether this action is barred by the doctrine of sovereign immunity;
4. Whether 7 C.M.C. §§ 2702 et. seq. bar this action;
5. Whether Fleming proved a claim under 42 U.S.C. § 1983;
6. Whether this matter was properly tried to a jury;
7. Whether the damages awarded are excessive.

The Court has read the briefs and heard the arguments of counsel and now denies the motion.

I.

Standard of Review

A motion for a judgment notwithstanding the verdict is technically a renewal of the motion for directed verdict and the Court freely determines the legal questions presented by the motion. Fed.R.Civ.P. 50(b); 9 Wright and A. Miller, *Federal Practice and Procedure* § 2537 (1971) (hereinafter Wright and Miller). In reviewing the sufficiency of the evidence to support the verdict, the Court should only enter a judgment notwithstanding the verdict where:

> the evidence is such that, without weighing the credibility of the witnesses or otherwise consid-

> ering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable [persons] could have reached.

Simblest v. Maynard, 427 F.2d 1, 4 (2nd Cir. 1970); *Yeaman v. United States,* 584 F.2d 322, 326 (9th Cir. 1978). The Court will view the evidence in a light most favorable to the party in whose favor the verdict was made and will not substitute its judgment of the facts for that of the jury. 9 Wright and Miller § 2537.

II.

Monetary Damages Against the Commonwealth under § 1983

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Commonwealth initially argues that 42 U.S.C. § 1983 does not apply within the Northern Mariana Islands. Section 502(a)(2)[1] of the Covenant[2] provides that those laws

---

[1] § 502 provides:

(a) The following laws of the United States in existence on the effective date of this Section and subsequent amendments to such laws will apply to the Northern Mariana Islands . . . :

* * * *

(2) those laws . . . which are applicable to Guam and which are of

which are applicable to Guam and which are of general application to the several States will be applicable to the Commonwealth. In support of its contention that § 1983 is not applicable to Guam, the Commonwealth cites an order of the District Court of Guam, *Ignacio v. Department of Corrections*, Civ.No. 79-00118 (D.Guam, Order dated May 26, 1982), slip op. at 4, which holds that as the Government of Guam has not waived its sovereign immunity by consenting to a suit brought pursuant to § 1983, the Government of Guam is not a "person" subject to liability under the Civil Rights Act. However, this decision, even assuming it to be correct, does not stand for the proposition that § 1983 does not apply to Guam. Rather, it merely holds that the *Government* is not a proper party defendant to an action for monetary damages. It must be remembered that under the doctrine announced in *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), government officials may be sued as government officials for declaratory and injunctive relief under § 1983. *See Edleman v. Jordan*, 415 U.S. 651, 664, 94 S.Ct. 1347, 1356, 39 L.Ed.2d 662 (1974). Additionally, the language of the statute allows suits against government officials in their individual capacities for monetary damages. *Civil Actions Against State Government* § 2.24 (Shepard's/McGraw-Hill 1982). The decision in *Ignacio* does not rule out such actions.

The language of § 1983 regarding its applicability in the territories is unambiguous. Redress may be sought against any person acting "under color of any statute, ordinance, regulation, custom, or usage, of any State *or Territory*." Without question this language evidences the intent that

---

general applicaiton to the several States as they are applicable to the several States[.]

[2] Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, 90 Stat. 263, *reprinted in* 48 U.S.C. § 1694 note.

§ 1983 apply to Guam as well as to the several States. Accordingly, pursuant to Section 502(c)(2) of the Covenant, § 1983 applies as well to the Northern Mariana Islands.

Of course, still unanswered is the primary issue of the liability of the Commonwealth for monetary damages under §1983.[3] Generally, the issue chosen for debate is whether a governmental entity (here, the Commonwealth) is properly considered a "person" within the meaning of the Civil Rights Act. Unfortunately, quite often confused with this issue are the defenses of sovereign and Eleventh Amendment immunity without proper distinctions drawn so as to define and keep separate the independent concepts. Therefore, in determining whether the Commonwealth is amenable to suit under § 1983 for monetary damages, this Court will consider separately, to the extent possible, the Commonwealth's status as a "person" under the Act, Eleventh Amendment immunity and sovereign immunity.

A. The Commonwealth as a "Person" under § 1983

Section 502 of the Covenant makes certain federal laws applicable to the Commonwealth "as they are applicable to the several States." Thus, a logical starting point for the determination of whether the Commonwealth is a "person" for purposes of § 1983 is whether or not States are so classified under the Act. However, this approach proves only to be a deceptive lead for the federal courts have not had occasion to decide this issue for the simple reason that the Eleventh Amendment[4] deprives federal courts of

---

[3] It can no longer be questioned that the Commonwealth is subject to suit for declaratory and injunctive relief for deprivations of constitutional rights. *Edleman v. Jordan*, 415 U.S. 651, 664, 94 S.Ct. 1347, 1356, 39 L.Ed.2d 662 (1974).

[4] The Eleventh Amendment provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign State.

jurisdiction over States as defendants. Thus, a court does not have the opportunity to address the threshold issue due to lack of jurisdiction. It is conceded that many district and circuit courts have stated in their decisions that States are not persons under § 1983; however, these decisions uniformly base their holding on the doctrines of constitutional or governmental immunity.[5] Thus, as Judge Hillman noted in *An-Ti Chai v. Michigan Technical University*, 493 F.Supp. 1137, 1160, "the Supreme Court has never decided whether a State is a 'person' for purposes of Section 1983." Therefore, to begin the analysis, the Court must look back to the history of the Civil Rights Act.

The Court finds persuasive, and adopts, the analysis and conclusions regarding governmental units, including States, as persons, set forth by Justice Brennan in his opinions in *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), *Quern v. Jordan*, 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979) (Brennan, J., concurring in the judgment) and *Jutto v. Finney*, 437 U.S. 678, 700, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978) (Brennan, J. concurring). These opinions are articulate and

---

[5] The decisions of the federal courts uncovered by this Court which have found a State or Territory not to be a person all rely on either (or in combination) Eleventh Amendment immunity *see e.g., Glosen v. Barnes*, 724 F.2d 1418 (9th Cir. 1984), *Neal v. Georgia*, 469 F.2d 446, 448 (5th Cir. 1972), common law sovereign immunity, *see e.g., Ignacio v. Department of Corrections, supra* p.3, slip op. at 4, *Toa Baja Dev. Corp. v. Garcia Santiago*, 312 F.Supp 899 (D.P.R. 1970) or on the since overruled doctrine of municipal immunity announced in *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), *overruled in Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), *see, e.g., Williford v. California*, 352 F.2d 474 (9th Cir. 1965), *Ohio Inns v. NYF.*, 542 F.2d 673 (6th Cir. 1976), *United States v. County of Philadelphia*, 413 F.2d 84 (3rd Cir. 1969) (based on *Monroe*, "conclusion . . . is inescapable"), *Deane Hill Country Club v. City of Knoxville*, 379 f.2d 321 (6th Cir. 1967), *United States v. Illinois*, 343 F.2d 120 (7th Cir. 1965), *Aubuchon v. Missouri*, 631 F.2d 581 (8th Cir. 1980).

well-reasoned and need no elaboration. The Court sets forth the essence of Justice Brennan's theory to the extent it is relevant here.

In support of his conclusions, Justice Brennan draws both upon the history of the Civil Rights Act as well as upon the language chosen by its drafters. Section 1983 was originally enacted as § 1 of the Civil Rights Act of 1871 and was passed pursuant to the enforcement provisions of the Fourteenth Amendment. *Quern,* 99 S.Ct. at 1182. The Fourteenth Amendment, of course, by its very language was drafted to curtail the power of the States in what was a great remodeling of the structures of federalism following the Civil War. *See Ex Parte Commonwealth of Virginia,* 100 U.S. 339, 25 L.Ed. 676 (1880). It can be logically assumed then that in enacting the Civil Rights Act, Congress intended that it apply to state as well as to individual action. *Quern,* 99 S.Ct. at 1153.

The language chosen bears out this conclusion. Created under § 1983 is a federal claim against "any person" acting under color of law who deprives another of rights guaranteed by the Constitution. Two months before the passage of the Civil Rights Act, Congress passed a bill which provided that "in all acts hereafter passed . . . the word 'person' may extend and be applied to bodies politic and corporate . . . unless the context shows that the words were intended to be used in a more limited sense." §2.16 Stat. 431. *Id.* Justice Brennan continues:

> Monell [*v. Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 61 (1978)*], held that "[s]ince there is nothing in the 'context' of § 1 of the Civil Rights Act calling for a restricted interpretation of the word 'person,' the language of that section should prima facie be construed to include 'bodies politic' among the entities that could be sued." 436 U.S., at 689-690 n.53, 98 S.Ct. at 2035. . . . Indeed during the very debates

> surrounding the enactment of the Civil Rights Act, States were referred to as bodies politic and corporate. *See, e.g.*, Cong. Globe, 42d Cong. 1st Sess., 661-662 (1871). . . (Sen. Vickers) ("What is a State? Is it not a body politic and corporate?") 99 S.Ct. at 1153-54.

Justice Brennan concluded that "the expressed intent of Congress manifested virtually simultaneously with the enactment of the Civil Rights Act of 1871, was that the States themselves, as bodies corporate and politic should be embraced by the term 'person' in § 1 of the Act." 99 S.Ct. at 1154. This conclusion is further supported by extensive review of the legislative history of the Act which is undertaken by Justice Brennan in *Quern* and need not be repeated here. *See* 99 S.Ct. 1154-1158.

Of course, the attitudes of those members of the Court who together formed the *majority* on the opinions discussing the language and effect of § 1983 cannot be ignored; however, they present no obstacle to the decision reached today and, in fact, implicitly lend support to this Court's holding. The only direct statement by the Supreme Court on the issue now under consideration appears in dicta[6] in *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976) wherein Justice Rehnquist wrote:

> The Civil Rights Act of 1871, 42 U.S.C. § 1983, had been held in *Monroe v. Pape*, 365 U.S. 167, 187-191, 81 S.Ct. 473, 484, 5 L.Ed.2d 492 (1961), to exclude cities and other municipal corporations from its ambit; that being the case, it could not have been intended to include States as parties defendant.

---

[6] The quoted language regarding § 1983 is not necessary to the decision of the case as the case involves an action against the state pursuant to Title VII and not § 1983 and is accordingly unbinding dicta.

96 S.Ct. at 2669. The holding in *Monroe* relied upon to support the Court's conclusion that States are not subject to § 1983 liability was explicitly overruled in *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Accordingly, the statement in *Fitzpatrick* now rests without foundation.

The Supreme Court has on another occasion addressed the conclusions drawn by Justice Brennan on this subject. In *Quern v. Jordan, supra*, p.7, Justice Rehnquist, writing for the majority, directly addresses Justice Brennan's concurrence and concludes:

> "[U]nlike our Brother BRENNAN, we simply are unwilling to believe, on the basis of such slender 'evidence', that Congress intended by the general language of § 1983 to override the traditional sovereign immunity of the States. We therefore conclude that neither the reasoning of *Monell* or of our Eleventh Amendment cases subsequent to *Edleman*, nor the additional legislative history or arguments set forth in Mr. Justice BRENNAN's concurring opinion, *justify a conclusion different from that which we reached in Edleman.* 440 U.S. at 341, (emphasis added).

Edleman stands for the proposition that while Congress has the power to waive the 11th Amendment immunity of the States, "such Congressional authorization . . . is wholly absent" under § 1983. 94 S.Ct. at 1360.[7] The Court distinguished *Parden v. Terminal Railway of Alabama State Docks Dept.*, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964) which involved "a congressional enactment which by its terms authorized suit by designated plaintiffs against

---

[7] Justice Brennan arrives at a different result, concluding that the immunity was waived by Congress and/or the States under § 5 of the Fourteenth Amendment. *Hutto v. Finney*, 98 S.Ct. 2578-2580. Of course, this was expressly rejected in *Edleman* and is not adopted by this Court.

a general class of defendants which literally included States." *Edleman*, 94 S.Ct. at 1360. Thus, the major focus of the Supreme Court's analysis of § 1983 has been not on liability under the Statute in the abstract but as to whether there has been any waiver of constitutional immunity. Upon closer examination however, it is evident that the proposition that States are persons under § 1983 is a logical and necessary corollary to the theories on this matter propounded by the Supreme Court.

The decisions of the Supreme Court have consistently stated that a State will not be liable in monetary damages under § 1983 absent a waiver by Congress or consent by the State. Of course, the Court has found that, even though Congress had the power to so do, pursuant to § 5 of the Fourteenth Amendment,[8] it did not abrogate the States'

---

[8] *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456, 96 S.Ct. 2666, 2671, 49 L.Ed.2d 614 (1976). Section 5 of the Fourteenth Amendment gives Congress the power "to enforce, by appropriate legislation" the provisions of the Amendment. At the hearing on this motion, the Commonwealth, in further support of its position that § 1983 does not apply within the Northern Mariana Islands, argued that Congress has no authority to enforce the Fourteenth Amendment by legislation such as § 1983 as § 5 of the Amendment is omitted from § 501. The Commonwealth misunderstands the purpose of § 501 and its effect on Congressional power. This section is intended "to extend to the people of the Northern Mariana Islands the basic rights of United States citizenship . . . and to make applicable . . . certain of the Constitutional provisions governing the relationship between the federal government and the States." *Covenant Analysis* at p.39. "The inclusion or omission of the power to legislate in the specific reference to certain provisions of the Constitution of the United States is not designed to affect the authority of the United States to legislate with respect to the Northern Mariana Islands. That power is governed by Article 1." Report of the Joint Drafting Committee on the Negotiating History at p.C-3 (Feb. 15, 1975), *reprinted in* S.Rpt.No. 433, 94th Cong., 1st Sess. 405 (1975). Section 105 allows the Congress "to enact legislation in accordance with its constitutional processes which will be applicable to the Northern Mariana Islands."

Eleventh Amendment immunity in passing the Civil Rights Act. *Quern v. Jordan, supra,* p.7, at 1147. Remaining is the issue of consent by the State itself. In *Alabama v. Pugh,* 438 U.S. 781, 98 S.Ct. 3057, 56 L.Ed.2d 1114 (1978), (per curiam) addressing a claim brought against the State of Alabama pursuant to § 1983, the Court elaborated on its earlier Eleventh Amendment holdings and reiterated that,

> [t]here can be no doubt, however, that suit against the State and its Board of Corrections is barred by the Eleventh Amendment, *unless Alabama has consented to the filing of such a suit.* [emphasis added].

98 S.Ct. at 3057. The ability of a State to waive its Eleventh Amendment immunity to a claim under § 1983 has been acknowledged subsequently by the Supreme Court, *Pennhurst State School & Hospital v. Halderman,* ___U.S. ___, 104 S.Ct. 900, ___L.Ed.2d ___(1984) and by the Ninth Circuit. *O'Connor v. Nevada,* 686 F.2d 749, 750 (9th Cir. 1982); *L.A. Branch N.A.A.C.P. v. L.A. Unified School District,* 714 F.2d 946, 950 (9th Cir. 1983); *Spaulding v. University of Washington,* 740 F.2d 686, 694 (9th Cir. 1984); *Hoohuli v. Ariyoshi,* 741 F.2d 1169 (9th Cir. 1984), *Almond Hill School v. U.S. Department of Agriculture,* No. 84-1943 (9th Cir. 1985) slip op. at 6.

It necessarily follows that if a State can waive its immunity from suit under § 1983 and be liable for monetary damages, a State must be a "person" under § 1983; for if a State were not a "person," immunity would not be an issue, as the statute would not apply by its own terms. Adopting this perspective on the problem, highlights the confusion which has surrounded this issue. Viewed in this light, however, it is clear that the Supreme Court opinions discussing § 1983 and the Eleventh Amendment support the conclusion reached today.

This Court concludes therefore that, based on the language of § 1983, its legislative history and on the recent Supreme Court decisions which have interpreted it, a State is a "person" liable under § 1983 for monetary damages but may not be brought to answer in federal court absent a valid waiver of its Eleventh Amendment immunity.

It follows that, pursuant to the applicability of laws provisions of § 502 of the Covenant, the Commonwealth, like a State is a 'person' under § 1983.

B. The Eleventh Amendment

The Commonwealth asks the Court to find that an action in this Court brought pursuant to § 1983 is barred by the Eleventh Amendment.[9] Section 501 of the covenant which enumerates the provisions of the United States Constitution applicable to the Commonwealth makes no mention of the Eleventh Amendment. In light of this omission, this Court has previously concluded that "the Covenant expressly rejects the proposition that the Eleventh Amendment is applicable within the CNMI." *Island Aviation, Inc. v. Mariana Islands Airport Authority,* Civ. No. 81-0069 (D.N.M.I. Memorandum Opinion filed May 26, 1983), slip op. at 16. Accordingly, the Commonwealth cannot seek the protection of the Amendment here.

C. Common Law Governmental Immunity

The Commonwealth asks the Court to find that even absent Eleventh Amendment protection, its inherent governmental immunity prevents this Court from assuming jurisdiction over an action against the Commonwealth for monetary damages. The Court declines the invitation.

That the people of the Northern Mariana Islands possess sovereignty, or the inherent right to self-government, is

---

[9] Although the Commonwealth appears to retreat from this position in its Supplemental Memorandum, at p. 2, the Court addresses the issue for purposes of clarity.

not disputed.[10] The people have entrusted their sovereignty to the democratic government of the Commonwealth through their ratification of a Constitution. Nor do the parties contest that the Commonwealth possesses the attendant attributes of a national sovereign. Whether the ancient doctrine recognized at common law that a government may not to be summoned before its own courts without its consent is one of those attributes need not be decided here.[11] The issue here presented, instead, is whether the Federal-Commonwealth relationship embodied in the Covenant allows the Commonwealth to be sued in a federal court for alleged violations of a federal law.

As did the people of the original States in the ratification of the Constitution, the people of the Northern Mariana Islands in drafting and approving the Covenant relinquished a degree of their sovereignty to the United States.[12] The Supreme Court, as discussed above, continues to struggle with the parameters of the sovereignty which

---

[10] The right of people of trusteeship territories to be self-governing is recognized in Articles 73 and 76 of the United Nations Charter. The right of the people of the Commonwealth to self-government is recognized specifically in Article 6 of the Trusteeship Agreement for the Former Japanese Mandated Islands and in the Preamble of the Covenant.

[11] The negotiators of the Covenant apparently, believed that the Commonwealth would be immune from suit on the basis of its own laws. Marianas Political Status Commission. *Section by Section Analysis of the Covenant to Establish A Commonwealth of the Northern Mariana Islands*, at p.11 (Feb. 15, 1975). *But see, Maruyama & Associates, Ltd. v. Mariana Islands Housing Authority*, Civ.No. 82-0066 (D.N.M.I. Decision filed May 24, 1984) slip op. at 3-4 (questioning modern application of "monarchistic doctrine" of sovereign immunity), *quoting Civil Actions Against State Government*, § 2.6, p.22 (Shepard's/McGraw-Hill, 1982).

[12] Section 101 of the covenant provides:

> The Northern Mariana Islands . . . wil become a self-governing commonwealth . . . in political union with and under the sovereignty of the United States of America.

the States ceded to the federal government. Hamilton has suggested that the States retained that sovereign immunity which they did not surrender "in the plan of the Convention." A. Hamilton, *The Federalist No. 81,* p.487 (C. Rossiter ed. 1961). This suggestion offers a logical and convenient framework with which to begin this analysis. Accordingly, the Covenant will be examined to determine what, if any, sovereign immunity the people of the Commonwealth surrendered in establishing a political union with the United States.

This analysis begins with a review of Section 501. As noted above, in Section 501 is enumerated those provisions of the United States Constitution which "will be applicable within the Northern Mariana Islands as if the Northern Mariana Islands were one of the several States." What follows are the specific clauses of each Article and/or Amendment which are adopted. From the specificity with which those applicable portions are identified, it is readily apparent that the drafters reviewed each and every clause of the Constitution to determine the appropriateness of inclusion in Section 501. Accordingly, it must be concluded that the omission of the Eleventh Amendment from Section 501 was the result of a conscious decision made by the drafters. "[I]n an instrument well drawn, as in a poem well composed, silence is sometimes most expressive." *Chisolm v. Georgia,* 1 L.Ed. 440, 455 (1793) (Wilson, J., concurring). The inference that the drafters intended that the Commonwealth be amenable to suit in federal court is inescapable.

Nonetheless, the Commonwealth is determined to avoid this inference. In brief and at the hearing, the government argues that the adoption of the Eleventh Amendment did not alter the meaning of Article III, but merely clarified the original intent of the framers that the federal judicial power was not to extend to cases or controversies in which a State was a defendant. Thus, the Commonwealth contends, the omission of the Eleventh Amendment from the

Covenant is irrelevant regarding the power of this Court, as Article III itself prohibits the assumption of jurisdiction over the unconsenting Commonwealth as defendant. While the commonwealth's theory regarding the Eleventh Amendment is not without support, *see,* L. Tribe, *American Constitutional Law,* at 130-131 (1977), the conclusions which the government asks us to draw are not logically necessary nor are they persuasive.

Initially, whatever the historians or legal scholars choose to consider, the genuine, true or original meaning of the language of Article III is academic in light of the events which transpired regarding Article III and the eleventh Amendment. In Chisolm v. Georgia, 1 L.Ed. 440 (1793), the Supreme Court interpreted Article III to allow suits against a State in federal court. "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must, of necessity expound and interpret that rule." *Marbury v. Madison,* 1 Cranch 137, 2 L.Ed. 60 (1803) (Marshall, C.J.). Chief Justice Warren comments that *Marbury* "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by the Court and the Country as a permanent and indispensable feature of our constitutional system." *Cooper v. Aaron,* 358 U.S. 1, 18, 78 S.Ct. 1401, 1409-1410 (1958). Thus, Chisolm never having been overruled, Article II must be interpreted as extending the federal judicial power to cases wherein States are defendants[13] the Eleventh Amendment, not Article III, protects the States against such action.

The implicit intent of the drafters simply does not allow the adoption of the Commonwealth's theory. Had the draf-

---

[13] If Art. III were as the Commonwealth reads it, query—how then would federal courts have jurisdiction even over consenting States; yet they clearly do. *Florida Dept. of State v. Treasure Salvors Inc.,* 458 U.S. 670, 102 S.Ct. 3304, 73 L.Ed.2d 1057 (1982).

ters intended that this Court's Article III jurisdiction[14] not extend to actions wherein the Commonwealth is a defendant, why not include the Eleventh Amendment? Even though the Supreme Court has been unwilling to extend the protections of the Amendment beyond bona fide States,[15] it is certainly arguable that as the constitutional provisions specified in § 501 apply to the Commonwealth as "if it were one of the several States," inclusion of the Eleventh Amendment would have afforded the Commonwealth the protection it now desires. Moreover, what little legislative history there is on Section 501 indicates that the interpretation the Court gives its jurisdictional grant today fully comports with the structural relationship intended by the drafters.

The Senate Committee Report relating to Section 501 of the Covenant[16] evidences a concern for the prevention of abuses of individual rights by the newly formed government:

> Because the due process clause and equal protection clause of the Fourteenth Amendment will apply to the Northern Marianas as if it were a State, the local government will also have to comply with many of the fundamental provisions of the Bill of Rights in its dealings with the local citizens. In addition, of course, the local government will be bound by the local Constitution and this will provide additional protections for individual freedom.

---

[14] This Court exercises the jurisdiction of a district court of the United States. 48 U.S.C. § 1694a(a).

[15] *See Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 400, 99 S.Ct. 1171, 1177, 59 L.Ed.2d 401, 410 (1979) (In refusing to include a bi-state compact agency within the Amendment's ambit, the Court said that "[b]y its terms, the protection afforded by that Amendment is only available to 'one of the Several States' ".)

[16] S.Rep. No. 94-433, 94th Cong., 1st Sess. (1975).

S.Rep.No. 94-433 at p.76. This position was also taken by the Marianas Political Status Commission. *Covenant Analysis* at pp. 44-45. While the argument could be made that the Commonwealth intended that it only be subject to actions for declaratory or injunctive relief to guard against such abuses, such a position could not stand. First, there is no evidence that the United States desired the Commonwealth's liability to be so limited. Second and more importantly, the inclusion of the Eleventh Amendment would have subjected the Commonwealth to equitable relief while offering the desired protection. More plausible is the position that the drafters were concerned specifically with the protection of individual liberties and freedoms and by omitting the Eleventh Amendment, fully intended that the Commonwealth be amenable to suit in federal court for monetary damages arising out of the deprivation of a complainant's constitutional rights. Today, this Court so holds.

Lastly, the drafters for the Commonwealth impliedly concede the correctness of what is held today in their analysis of the Commonwealth's sovereign immunity. Regarding Section 103, guaranteeing the right of self-government, the Commission states:

> The Northern Mariana Islands government will be an independent government, like that of the States. For the same reasons, the Government of the Northern Mariana Islands will have sovereign immunity, *so that it cannot be sued on the basis of its own laws without its consent.* (emphasis added)

Covenant Analysis, at p.11. Again, the conspicuous absence of any mention of federal court immunity supports the court's conclusion.

In summary, the Court finds it evident that the people of the Commonwealth intended, that "in the plan of the Covenant," they would relinquish a specified degree of sovereignty to the United States under the newly created

political union. In order to protect individual rights and freedoms enjoyed under the Bill of Rights, and in hopes of preventing other governmental abuses, the Eleventh Amendment would not be applicable to the Commonwealth; thereby citizens would have the opportunity to summon the Commonwealth before the federal courts to seek redress for deprivations of their constitutional rights. Accordingly, pursuant to the Covenant and to 48 U.S.C. § 1694a, this Court has jurisdiction over actions brought against the Commonwealth for monetary damages pursuant to 42 U.S.C. § 1983.

II. 7 CMC § 2202

The Commonwealth contends that this action is barred by the Commonwealth's tort claims act codified at 7 CMC § 2202. As the Court finds that immunity from the instant action was surrendered with the ratification of the Covenant, the cited Commonwealth statute cannot rejuvenate that immunity.[17]

III. Sufficiency of Claim under § 1983

The Commonwealth contends that the allegations made by Fleming and the evidence introduced at the trial are not sufficient to support & claim under § 1983. In his complaint and throughout the trial, Fleming alleged that the failure to timely establish uniform hiring procedures, the failure to adhere consistently to those procedures which were occasionally developed, and the decision to process Fleming's application in a manner different from the other applicants and in the end the decision to deny him em-

[17] Section 102, the Supremacy Clause, of the Covenant provides:

The relations between the Northern Mariana Islands and the United States will be governed by this Covenant, which, together with those provisions of the Constitution, treaties and laws of the United States applicable to the Nothern Mariana Islands, will be the supreme law of the Northern Mariana Islands.

ployment deprived him of property and liberty without due process of the laws and denied him his equal protection of the laws. Additionally, the Commonwealth argues that even assuming a valid claim would lie as against an individual, there is insufficient evidence of a nexus between the deprivation and official government policy to subject the Commonwealth to liability.

A. Due Process Claims

Under the principles of due process embodied in the Fourteenth Amendment, the government may not deprive a person of life, liberty or property without due process of the law. When addressing claims of unconstitutional deprivations of property or liberty in liberty interests, federal courts follow a two-step analysis: 1) does the claimant possess a constitutionally protected interest 2) of which he or she was deprived in a manner not comporting with due process? *Morrissey v. Brewer,* 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972); *Belnap v. Chang,* 707 F.2d 1100, 1102 (9th Cir. 1983).

The "liberty" and "property" interests are based on broad and dynamic concepts founded in our constitutional framework. The interests protected extend well beyond the literal meaning of the words themselves. Thus,

> "[t]he [Supreme] Court has . . . made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money. By the same token, the Court has required due process protection for deprivations of liberty beyond the sort of formal constraints imposed by the criminal process. [footnotes omitted].

Board of Regents of State Colleges v. Roth, 408 U.S. 564, 571-572, 92 S.Ct. 2701, 2706, 33 L.Ed.2d 548 (1972). Based upon the evidence introduced in the trial of this matter,

the Court remains convinced that Fleming has proved the deprivation of his protected liberty interests.[18]

The federal courts have consistently recognized that the freedom to pursue a desired vocation is commanding of a measure of constitutional protection. *Phillips v. Bureau of Prisons,* 591 F.2d 966, 970 (D.C.Cir. 1979). The "right to follow a chosen profession comes within the 'liberty' . . . concept[ ] of the Fifth Amendment." *Chalmers v. Los Angeles,* 762 F.2d 753, 757 (9th Cir. 1985). *See also Wells v. Doland,* 711 F.2d 670, 676 (5th Cir. 1983) (the "liberty protected . . . encompasses an individual's freedom to work and earn a living"). Quite often, this liberty interest is infringed by an employer's dismissal of, or refusal to rehire, an employee in such a manner so as to " 'stigmatize' or otherwise burden the individual so that he is not able to take advantage of other employment opportunities." *Bollow v. Federal Reserve Bank of San Francisco,* 650 F.2d 1093, 1101 (9th Cir. 1981). *See also Stratten v. Wadsworth Hospital,* 537 F.2d 361, 366 (9th Cir. 1976) (manner of dismissal must not result in "permanent exclusion from, or protected interruption of gainful employment within the trade or profession"). Although the facts here presented do not fall directly on point with this category of cases, the allegations made and proved do show a severe infringement of Fleming's ability to pursue his chosen vocation. It is this infringement, whether in a dismissal setting, a refusal to hire scenario, or in any other context, which is the operative government action.

---

[18] Because a constitutionally recognized 'liberty' interest is found the deprivation of which alone support Fleming's claim, the Court makes no determination as to the existence of a protected 'property' interest. *Compare Chalmers v. Los Angeles* 762 F.2d 753 (9th Cir. 1985) (right to follow chosen profession comes within property concept) *with Roth v. Board of Regents,* 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972) (to have protectable property interest in a job one must have more than an abstract need or desire for or unilateral expectation of it.)

The Seventh Circuit eloquently summarized:

> The concept of liberty in Fourteenth Amendment jurisprudence has long included the liberty to follow a trade, profession, or other calling. This liberty must not be confused with the right to a job; states have no constitutional duty to be employers of last resort; but if a state excludes a person from a trade or calling, it is depriving him of liberty, which it may not do without due process of law.

Lawson v. Sheriff of Tippecanoe County, Ind., 725 F.2d 1136, 1138-39 (7th Cir. 1984).

Fleming has shown that he desired to pursue a profession as a police officer, and that he was denied the initial step of admission to the police academy. The desire to pursue a career as a police officer has been recognized as constitutionally protectable. *See e.g., DiIulio v. Board of Fire and Police Commissioners,* 682 F.2d 666 (7th Cir. 1982). Were Fleming seeking the same position in any state of the union, it may be arguable that denial of employment on one force does not sufficiently foreclose one's opportunity to work as a police officer to implicate liberty interests. For example, a refusal to hire by a city police force would not necessarily foreclose employment opportunities with the county sheriff, the state patrol, another municipal force or even the United States Marshal Service. The situation in the Commonwealth, however, is unique. There exists only one police force for all the Northern Mariana Islands. The nearest force outside the Commonwealth is on Guam which is an unsatisfactory alternative for two reasons. First, due to geographical, cultural and societal considerations, employment on Guam for a person from Saipan is not a reasonable alternative, Second, and more importantly, Saipan is Fleming's home and the fact that there may be employment opportunity on a neighboring island or even on the mainland is not sufficient to

support a conclusion that employment in his chosen profession was not severely restricted. Rather, because of the unique situation here in the Commonwealth, the Court remains convinced that the Department's refusal to allow Fleming to join the police academy sufficiently curtailed Fleming's opportunity to pursue his chosen profession and as such constitutes an infringement of his constitutionally protected liberty interests. Of course, such infringement alone is not actionable, rather a determination must be made as to whether the deprivation was accomplished without the requisite due process.

The guarantee of due process has two components, one "procedural" and the other "substantive." *See generally Sirilan v. Castro,* DCA No. 83-9009 (D.N.M.I.(App.Div.) Oct. 24, 1984) slip op. at 8-14 (traces development and purposes of substantive due process). The procedural component provides that when a person is deprived of a liberty or property interest, he or she is entitled to notice and a hearing. *See Board of Regents v. Roth,* 92 S.Ct. at 2707.[19] the substantive element protects persons from government action which is arbitrary or capricious. Justice Harlan has written that the scope of liberty protected by substantive due process "is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints." *Poe v. Ullman,* 367 U.S. 497, 543, 81 S.Ct. 1752, 1777, 6 L.Ed.2d 989 (1961) (Harlan, J., dissenting).[20] Simply stated, "[t]he Due Process

---

[19] Whether such notice and hearing are required prior to the adverse action depends on a balance of competing interests under the circumstances. *Superales v. Appeals Board of the Judicial Council of Guam,* DCA No. 82-0192A (D.Guam(App.Div.) Apr. 18, 1984) slip op. at 5, citing *Matthews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) and *Vanelli v. Reynolds School District No. 7,* 667 F.2d 773, 778-779 (9th Cir. 1982).

[20] Justice Harlan's dissenting view stated in *Poe* was later adopted by the majority of the Court in *Moore v. City of East Cleveland,* 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977).

Clause . . . forbids arbitrary deprivations of liberty." *Goss v. Lopez*, 419 U.S. 565, 574, 95 S.Ct. 729, 736, 42 L.Ed.2d 725 (1975). More specifically, "[c]onstitutional due process guarantees that no person will be arbitrarily deprived by the government of his liberty to engage in any occupation." *DiIulio v. Board of Fire and Police Commissioners, supra* p.25, at 669.

Fleming alleged, and proved, an arbitrary refusal to hire. The testimony showed that thirty persons applied for the position of Police Officer I in 1983. According to the Department's policy then in effect,[21] the names of the applicants were forwarded to a police review commission. The commission recommended that fourteen of the applicants be hired. Fleming's application was placed on hold pending an investigation into "suspected" drug activity.[22] When the investigation turned up negative, Fleming's name was included among those recommended for hire by the commission. The Director of the Department nonetheless refused to hire Fleming because the Director still believed Fleming to be a narcotics dealer. The arbitrariness of such a procedure is evident. Not only is there no evidence that other candidates were subjected to a Drug Enforcement Administration background investigation, but even upon a report clearing Fleming of drug involvement, the Director still refused to hire Fleming on those grounds. Thus, not only was there no evidence to support the initial suspicion, the Director took the adverse action based on the suspicion with full knowledge that the allegation was completely unsupported by the federal agency charged with responsibility over such matters. There is sufficient evidence to support the jury's conclusion as to an arbitrary deprivation of Fleming's protected liberty interests.

---

[21] As the policy changed throughout the course of the preceding year, not all candidates entering the Academy at that time were required to pass Commission review.

[22] There is no evidence that any other candidate underwent this additional investigation.

B. Equal Protection

Fleming also alleged in his complaint and at trial that in its refusal to hire Fleming, the Commonwealth, acting through the Department, denied him equal protection of the laws. There exists some overlap between the protection offered by the due process clause and that provided under the equal protection claus. "Equal protection demands at a minimum that a [government] must apply its laws in a rational and non-arbitrary way." *Ceichon v. City of Chicago,* 686 F.2d 511, 522 (7th Cir. 1982). The focus of equal protection analysis, however, is on the differential treatment afforded similar persons in like circumstances. "The guarantee of equal protection . . . is . . . a right to be free from invidious discrimination in governmental activity." *Harris v. McRae,* 448 U.S. 297, 372, 100 S.Ct. 2671, 2691, 65 L.Ed.2d 784 (1980). "It is axiomatic that the Equal Protection Clause . . . guarantees like treatment to persons similarly situated." *Desris v. City of Kenoshe, Wisconsin,* 687 F.2d 1117, 1119 (7th Cir. 1982). Put another way, "[w]hen a choice is made by the government, the obligation to afford all persons the equal protection of the laws arises." *Kirchberg v. Feenstra,* 609 F.2d 727 (5th Cir. 1979). Lastly, it is undisputed that "the constitutional mandate of equal protection extends to discriminatory executive or administrative conduct as well as to discriminatory legislation." *Jackson v. Marine Exploration Co., Inc.,* 583 F.2d 1336, 1347 (5th Cir. 1978).

The facts recited above, *ante* p.28, regarding the treatment accorded Fleming during the recruitment and application process also support his equal protection claim. Fleming, along with the twenty-nine other applicants whose applications were reviewed by the review board, was treated differently than other applicants hired earlier in the year who were required only to interview with the Chief of Police or the Department Director. While this alone may not necessarily show discriminatory treatment,

it adds support when viewed in conjunction with the other evidence. Fleming alone was subject to a DEA background investigation. Moreover, Fleming was the only applicant recommended by the review board yet refused employment by the Director. This evidence establishes a prima facie case of purposeful discrimination.[23] "[E]ven an isolated event may contravene the equal protection clause if different action is taken against persons similarly situated without showing any rational basis for the disparate treatment." *Smith v. State of Georgia*, 684 F.2d 729, 736 (11th Cir. 1982). Upon the presentation of a prima facie case, the burden shifts to the Commonwealth "to dispel the inference of intentional discrimination." *Castaneda v. Partida*, 430 U.S. 482, 497-498, 97 S.Ct. 1272, 1282, 51 L.Ed.2d 498, 512 (1977). Furthermore, "it is established that mere protestations of lack of discriminatory intent and affirmations of good faith will not suffice to rebut the prima facie case. . . . A defendant must introduce evidence to support its explanations." *Jean v. Nelson*, 711 F.2d 1455, 1486 (11th Cir. 1983). Here, the government offered no sufficient justification to support its actions. The jury's findings of purposeful discrimination is supported by the evidence and justifies the conclusion that Fleming was denied the equal protection of the laws.

C. Governmental Policy

A government is not liable under § 1983 solely on the basis of respondent superior for the torts commited by its employees.

---

[23] Discrimination, to be actionable under the equal protection clause must be intentional. *Wahsington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). However, such intent may be inferred. *Smith v. State of Georgia*, 684 F.2d 729 (11th Cir. 1982). The Commwealth does not challenge the jury's implicit finding of the requisite intent (set forth in Plaintiff's Jury Instruction No. 7 as an essential element of the claim). Moreover, there is ample evidence to support the finding.

> Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

Monell v. Department of Social Services, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037-2038, 56 L.Ed.2d 611 (1978). The Commonwealth cites this language in support of its contention that it cannot be held liable for the acts of the Department or its employees absent evidence of some official policy which inflicts the injury. In further support, the Commonwealth cites *City of Oklahoma City v. Tuttle,* ___U.S. ___, 53 L.W. 4639 (1985) to bolster its contention that official policy was not the cause of the injury.

Turning first to *Tuttle.* On brief,[24] and during oral argument, the Commonwealth argued that *Tuttle* prohibits the finding of § 1983 liability based only upon the showing of a single incident of unconstitutional activity; since Fleming alleges only such one act, the Commonwealth concludes, no liability is permissibly imposed. However, this is not what *Tuttle* holds. In *Tuttle,* the respondent brought an action against the petitioner, Oklahoma City, pursuant to § 1983 for the killing of her husband by a rookie city police officer. A jury's verdict in favor of the police officer but against the city for $1,500,000.00 was upheld by the Court of Appeals for the Tenth Circuit. The Supreme Court reversed.

Referring to *Monell,* the Supreme Court reiterated the earlier holding that a government may not be liable absent some nexus between the injury and official government policy. The question presented in *Tuttle* was "whether a single isolated incident of the use of excessive force by a

---

[24] *See* Memorandum of Points and Authorities in support of Commonwealth's Motion to Reconsider (June 20, 1985) at 3-4.

police officer establishes an official policy or practice of a municipality sufficient to render the municipality liable for damages under 42 U.S.C. § 1983." 53 L.W. 4642, n.2. Even though there was evidence of policy and inadequate training, the Supreme Court did not consider it because the court's instructions allowed the jury to infer, from a single incident of excessive force, inadequate training or supervision; based on this instruction alone, the Supreme Court reversed. While municipal liability may be established by proof of a single incident where such proof includes "proof that it was caused by an existing, unconstitutional municipal policy[ ] which can be attributed to a municipal policymaker," *Id.* at 4643, such policy may not be *inferred.* Thus, the Court did not, as the Commonwealth contends, turn away cases wherein only one unconstitutional action was shown. Rather, the Court merely reasserted a *Monell* requirement that a nexus between the unconstitutional act of a non-policymaker and official government policy be demonstrated.

Here, this Court is convinced that the actions in question represented the official acts of the Commonwealth government. The unconstitutional conduct was carried out by the Director of Public Safety and/or the Chief of Police. Both officials are high in the government's organizational hierarchy. This Court has held in an earlier § 1983 action that the "acts and edicts" of a Commonwealth agency director "unquestionably" represent the official policy of the government. *Island Avition, Inc. v. Mariana Islands Airport Authority,* Civ.No. 81-0069 (D.N.M.I. Memorandum Opinion filed May 26, 1983) slip op. at 15. This conclusion is supported by language in *Tuttle.* Quoting *Thayer v. Boston,* 36 Mass. 511, 516-517 (1837), the Court writes:

> "As a general rule, the [municipal] corporation is not responsible for the unauthorized and unlawful acts of its officers, though done *colore officii;* it must further appear, that they were expressly authorized to do the acts, by the city

> government, *or that they were done bona fide in pursuance of a general authority to act for the city* on the subject to which they relate[.]" [emphasis added]

Tuttle, 53 L.W. 4642, note 5. The Supreme Court concludes that *Monell's* policy or custom requirement "should make clear that, at the least, that requirement was intended to prevent the imposition of municipal liability under circumstances where no *wrong could be ascribed to municipal decision-makers.*" *Id.* [emphasis added.]

Here, the Director's policymaking capacity and general authority to act on behalf of the Commonwealth are clear. The Director is appointed by the Governor with the advice and consent of the Senate.[25] He or she is the "administrative officer of the Department"[26] and is given the authority to employ staff[27] as is required to carry out his or her primary duties which include the provision of "effective police protection to inhabitants of the Commonwealth."[28] That the Director is authorized to recruit and employ police officers and that these actions represent official Commonwealth policy cannot be disputed.

IV. Jury Trial

The issue as to whether Fleming was entitled to a jury trial on his § 1983 claim is now before the Court for the third time. After initially dismissing the jury demand for lack of a legal claim,[29] on Fleming's Motion for Reconsideration, the Court reinstated the jury demand finding that

---

[25] 1 C.M.C. § 2502

[26] 1 C.M.C. § 2503

[27] 1 C.M.C. § 2505

[28] 1 C.M.C. § 2504(a)

[29] Decision Filed April 11, 1985.

Fleming's demands were in fact legal in nature.[30] The Commonwealth now brings another challenge to Fleming's right to a jury trial in this action: Conceding the validity of the previous decision regarding the legal nature of the damages sought herein, the Commonwealth contends that no right existed at common law to a jury in a civil action against a sovereign. Accordingly, the government concludes, Fleming has no such right under the Seventh Amendment in this action.

The starting point of this analysis necessarily begins with the language of the Seventh Amendment:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by the jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

The Seventh Amendment is made applicable within the Commonwealth pursuant to Section 501 of the Covenant. Any analysis of this Amendment must be "guided by the axiom that the right of jury trial in civil case is a basic 'fundamental right, and that any seeming curtailment of the right to jury trial should be scrutinized with the utmost care.' " *Standard Oil Co. of California v. Arizona*, 738 F.2d 1021, 1023 (9th Cir. 1984), *quoting In Re U.S. Financial Securities Litigation*, 609 F.2d 411, 421 (9th Cir. 1979), *cert. denied* 446 U.S. 929, 100 S.Ct. 1866, 64 L.Ed.2d 281 (1980).

The Amendment's "Suits at common law" refers to the common law of England in 1791, the date of the Amendment's adoption. 9 Wright and Miller § 2302, at 14 (1971). As the terms of the Amendment preserve, and do not grant, the right to a jury trial, courts undertake a historical analysis to determine whether the action at issue

---

[30] Decision Filed June 17, 1985.

would have been triable to a jury at common law. The Ninth Circuit has developed a two-step test for determining the historical right to jury trial: "are the issues to be tried legal and, if so, are the issues the sort that would have been tried to a jury in England in 1791." *Standard Oil Co. of California v. Arizona, supra,* at 1027. This bifurcated analysis is necessary because the legal-equitable distinction does not end the analysis; quite often at common law, legal issues were nonetheless tried by the judge and not by the jury. Not only were legal issues such as jurisdiction, venue and witness competence tried by a judge, but, important here, "inquir[ies] concerning the right to jury trial in legal actions in England in 1791 could also turn on matters such as sovereign immunity which are extraneous to the legal-equitable distinction." *Standard Oil Co. of California v. Arizona, supra,* 738 F.2d at 1026.

The commonwealth does not challenge, nor does the Court question, the previous decision finding that Fleming seeks damages of a legal nature pursuant to § 1983 which, as a preliminary matter, entitle him to a jury trial; the first part of the test is met. Can, however, the Commonwealth set up its own sovereign immunity as a bar to a jury trial?

The Supreme Court has consistently held that in actions against the federal government there is no right to a jury trial, save for the government's consent, for there were no actions against the sovereign in common law. *McElrath v. United States,* 102 U.S. 426, 26 L.Ed. 189 (1880); *Galloway v. United States,* 319 U.S. 372, 63 S.Ct. 1077, 87 L.Ed. 1458 (1943); *Lehman v. Nakshian,* 453 U.S. 156, 101 S.Ct. 2698, 69 L.Ed.2d 548 (1981). Unfortunately, the Court has not had occasion, as far as can be determined, to set forth standards by which to determine the extent and nature of a State's or Territory's sovereign immunity and the effects on the Seventh Amendment right to jury trial. As noted above, the imposing presence of the Elev-

enth Amendment has rendered further analysis of collateral issues, such as jury trial rights, unnecessary.

Here, however, the issue must be addressed. As a general matter, it is well settled that when a State chooses to waive its sovereign immunity, it may freely condition and limit the nature and form of the action filed against it. *Civil Actions against States, supra,* p.5. § 3.5. Quite often a State, for example, will permit actions against it before a judge, but not a jury. *See, e.g.,* 7 C.M.C. § 2253 (actions against the Commonwealth permissible under local law to be tried by court without a jury). The ability to so condition a waiver necessarily derives from the States authority to deny any consent altogether; unquestionably, the authority to grant waiver necessarily includes the power to offer a partial or conditional consent. Thus, where sovereign immunity is not a bar to the action altogether, the court must examine the nature of the waiver itself to determine whether it also encompasses the question of jury trial. *See, e.g., Lehman v. Nakshian, supra* p.38, at 2702 (Age Discrimination in Employment Act substantially abrogates State sovereign immunity and allows jury trials whereas the statute limits suits against the United States to court trials).

The Commonwealth has waived its sovereign immunity from suit in federal court for federal claims. *See* II.C. *supra.* The issue here becomes whether this waiver is so conditioned so as to subject the Commonwealth to trial before federal judges only. There is no evidence that the waiver was in fact so conditioned. As was concluded above, the drafters made a conscious decision to subject the Commonwealth to liability for violation of federal statutory and constitutional law. In 1974, the Supreme Court definitively held that actions enforcing federal statutory rights carry with them the right to jury trial. *Courts v. Loether,* 415 U.S. 189, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974). Justice Marshall's unequivocal statement of the holding is worth repeating here:

> Whatever doubt may have existed should now be dispelled. The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in ordinary courts of law.

94 S.Ct. at 1008. Thus, it should have been clear to the drafters that jury trials would be available in legal actions against the Commonwealth; yet no attempt to condition the waiver is anywhere evidenced.

Moreover, the concept of jury trials in the Commonwealth was by no means ignored. The Northern Mariana Islands delegation expressed great concern over the use of juries in general. They decided that the legislature should be given the opportunity to review the desirability of jury trials in general and to "mold the procedures to fit local conditions and experience." *Covenant Analysis* at 46. Accordingly, Section 501 includes the proviso that "neither trial by jury nor indictment by grand jury shall be required in any civil action or criminal prosecution *based on local law,* except where required by local law."[31] [emphasis added] In discussing this provision, the Status Commission concedes that "[f]ederal cases, however, will have to be tried before juries when required under federal law." *Covenant Analysis* at p.46. Likewise, the Senate Committee Report emphasizes that the jury trial provision "exempts proceedings in the local courts—except where required by local law—from the requirements of. . . trial by jury." Report No. 94-433, *supra,* p.20, at 74. Rather than extending this limitation on jury trials to the federal

---

[31] Art. 1, Sec. 8 of the Commonwealth Constitution provides:

> The legislature may provide for trial by jury in criminal or civil cases.

Local law currently allows for jury trials in civil cases wherein the amount in controversy exceeds $1,000.00. 7 C.M.C. § 301(b)(1).

court, the drafters explicitly limited the provision to local courts. It can be safely assumed that the drafters were aware that federal statutory rights claims include jury trial entitlements and decided not to curtail this right by a condition of its waiver of constitutional immunity under Section 502. Accordingly, under the test set forth in *Standard Oil Co. of California v. Arizona, supra* p.36, § 1983 includes a Seventh Amendment right to jury trial and such an issue would have been tried to a jury in 1791, there being evidenced a waiver of sovereign immunity. The trial by jury was proper.

V. Damages

Finally, the Commonwealth argues that the verdict awarding damages of $80,000.00 is excessive and calls for a new trial. Where it is difficult to measure a person's injury in monetary terms, the Court is reluctant to disturb a jury award which is not unreasonable on its face. *Parker v. Shonfeld*, 409 F.Supp. 876, 879 (N.D.Cal. 1976). A jury's verdict will not be set aside merely because the judge would have awarded a different amount of damages. 11 Wright and Miler, at § 2807. A new trial may be granted only if the verdict is against the great weight of the evidence, or "it is quite clear that the jury has reached a seriously erroneous result." *Coffran v. Hitchcock Clinic, Inc.*, 683 F.2d 5, 6 (1st Cir. 1982); *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336 (9th Cir. 1984).

In the case at bar, Fleming sought damages for a deprivation of his civil rights, wrongful refusal to be employed in his chosen career as a police officer and resulting pain, suffering, embarrassment and humiliation. These damages are best assessed by Fleming's peers from this island. This Court is not convinced that the verdict is clearly excessive and denies the motion.

VI. Conclusion

For the reasons stated herein, the Commonwealth's motion for judgment notwithstanding the verdict or for new trial is DENIED.

DATED this 11th day of September, 1985.

/s/ALFRED LAURETA
JUDGE ALFRED LAURETA

APPENDIX E

IN THE DISTRICT COURT
FOR THE
NORTHERN MARIANA ISLANDS

CIVIL ACTION NO. 84-0006

LAWRENCE FLEMING,

Plaintiff,

VS.

DEPARTMENT OF PUBLIC SAFETY, AND COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,

Defendants.

FILED
JUN 17 1985

DECISION

The plaintiff Lawrence Fleming brings this action against the defendants Department of Public Safety (DPS) and the Commonwealth of the Northern Mariana Islands pursuant to 42 U.S.C. §1983 for alleged violations of his constitutional rights in allegedly refusing to hire him to the position of Police Officer I. Before the Court are two motions; 1) Fleming's motion for reconsideration of the Court's earlier decision striking Fleming's jury trial demand; and 2) the Commonwealth's motion for summary judgment. The Court has read the briefs and has heard the arguments of counsel and is now ready to render its decision on these matters.

A. Motion for Reconsideration

In its written decision filed on April 11, 1985, this Court struck Fleming's demand for jury trial. In essence this

Court found that the only legal damages which Fleming sought for the alleged violations of his constitutional rights were back wages. Under the reasoning of *Williams v. Owens-Illinois Inc.*, 665 F.2d 918 (9th Cir. 1982), such damages are considered to be merely incidental to Fleming's request for injunctive relief and do not entitle him to a jury trial. Fleming included in his prayer in a separate numbered paragraph a demand for "damages in the sum of $100,000.00 for pain, suffering and humiliation and loss of reputation arising out of the false and defamatory statements uttered by the defendant's agents and employees." The nature and form of this demand led the Court to believe that Fleming was seeking defamation damages separate from and independent of the § 1983 claim. Accordingly, the jury demand was denied pursuant to § 501(a) of the Covenant.

Fleming, in this motion, argues that the monetary damages he seeks, including pain, suffering and related damages all flow from the violation of his civil rights. Fleming notes that nowhere in the body of his complaint does he assert a claim for common law defamation, nor does he make the necessary jurisdictional allegation to support a pendant common law claim. Of some importance as well is the representation of Fleming's counsel made at the hearing on this motion that Fleming no longer seeks injunctive relief in this action. Fleming has convinced this Court that, in redress of the alleged constitutional violations, he in fact does seek legal damages which are not properly characterized as incidental to equitable relief, notwithstanding the perhaps inartful nature and form of his prayer for relief.

Accordingly, Fleming is entitled to a jury trial under the Seventh Amendment; the previous Decision of this Court striking the jury demand is vacated and Fleming's demand is reinstated. The parties should be prepared to present this case to a jury on June 24, 1985.

B. Summary Judgment

As the Court concludes that no separate claim for common law defamation has been asserted by Fleming, the only issue to be decided as to the Commonwealth's motion for summary judgment is whether or not DPS is amenable to suit under § 1983. This Court has previously held that the Commonwealth and its agencies are proper defendants in an action brought pursuant to 42 U.S.C. § 1983. *Island Aviation, Inc. v. Mariana Islands Airport Authority,* Civ.No. 81-0069 (D.N.M.I. Memorandum Decision filed may 26, 1983). Accordingly, the motion for summary judgment is denied.

DATED this 17th day of June, 1985.

/s/ ALFRED LAURETA
JUDGE ALFRED LAURETA